REPORTS OF

ARGUED AND

The Co[illegible] 's Bench,

[illegible]INITY TERMS,

IN

[illegible]FTH AND SIXTH GEO. IV.

BY

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AND

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BARRISTERS AT LAW.

VOL. VI.

WITH AN INDEX,

AND

TABLE OF PRINCIPAL MATTERS.

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JUDGES

OF THE

COURT OF KING'S BENCH,

During the Period comprised in this Volume.

Sir Charles Abbott, Knt. C. J.
Sir John Bayley, Knt.
Sir George Sowley Holroyd, Knt.
Sir Joseph Littledale, Knt.

Sir John Singleton Copley Knt. Attorney-General.
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A

TABLE

OF THE

CASES REPORTED

IN THE SIXTH VOLUME.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

EASTER TERM,

IN THE SIXTH YEAR OF THE REIGN OF GEORGE IV.

1825.

Wednesday, April 20.

BUCKLE *v.* BEWES.

The 29 *Eliz.* c. 4. against extortion by sheriffs and their officers, declares that the defendant "shall lose and forfeit to the party grieved his *treble damages:*" this means, three times the *full* amount of damages found by the verdict.

IN this case the plaintiff had recovered 50*l.* 5*s.* damages, under the stat. 29 *Eliz.* c. 4. against the defendant, as sheriff, for alleged extortion (*a*). The master had estimated the treble damages given by the statute in the same mode in which treble costs are allowed when given by statute, namely, the sum given by the jury, half that sum, and then half the latter sum, making together 87*l.* 18*s.* 9*d.* instead of 150*l.* 15*s.* (*b*). Last term a rule nisi was obtained for the master to review his taxation and allocatur, on the ground that he ought to have allowed the plaintiff three times the *full* amount of damages found by the verdict.

Carter now shewed cause, and contended that the master had rightly estimated the damages by the same rule which is acted upon in the taxation of costs where treble costs are given by statute. Double or treble damages are not to be understood to mean, according to their literal import, twice

(*a*) Vide S. C. ante, vol. v. 495.

(*b*) See *Deacon* v. *Morris*, 2 B. & A. 393. 1 Chit. Rep. 137. Tidd, 1024, 5. 8th ed.

the amount of single damages. There is no reason why a different rule should apply to damages that applicable to costs. In contemplation of law, form part of the damages (*a*), but treble costs are calculated only in this manner—first, the common costs, second, half of these, and then half the latter.

Parke, in support of the rule, relied upon *Woodgate* v. *Knatchbull* (*b*) as a case in point, where, according to a note in the master's office, three times the *full* amount of the damages were allowed on the taxation; and the propriety of that proceeding was never questioned by the parties.

Abbott, C. J.—I am of opinion that the master has in this case founded his allocatur upon an erroneous notion that the rule in taxing treble costs when given by statute, applies also to the case where treble damages are given. The 29 *Eliz*. c. 4. in express terms says, that the defendant "shall lose and forfeit to the party grieved his *treble damages*." This must mean three times the *full* amount of the damages found by the jury, or it means nothing. If the statute, in terms, gives *treble* damages, I am at a loss to understand why we are to hold that the party is to have 50*l*. 5*s*. and three quarters of that sum only by way of increase. I can understand why in the taxation of treble costs the rule referred to is adopted, for that rule may have reference to the costs *out of pocket*. But that rule is unintelligible as applied to damages, which are here given by way of penalty, or compensation for the injury sustained. In this case it is to be observed that the statute says nothing about costs, although it has been held that treble costs are recoverable by the plaintiff who recovers treble damages in an action thereon; but in that case the taxation of the treble costs is governed by the rule referred to (*c*). I am of opinion that

(*a*) *Phillips* v. *Bacon*, 9 East, 298. (*b*) 2 T. R. 148.

(*c*) See *Tyle* v. *Glede*, 7 T. R. 267. *Deacon* v. *Morris*, 2 B. & A. 393. 1 Chit. 137. S. C. Cowp. 368. Dyer, 159, b. *Hullock* on Costs. 2d ed. 17. *Gilbert* on Distress, by *Hunt*, 64.

the plaintiff is entitled to *treble the full* amount of damages found by the verdict; and therefore this rule must be made absolute.

PER CUR.

Rule absolute (a).

(a) Vide *Bro. Ab. Tit Damages*, pl. 70. and *Sayer's* Law of Damages, 244. from which it appears that treble damages are not calculated or assessed by the Court in the same manner as treble costs, for in that case the jury having, upon the statute against forcible entries, given 20*l.* damages, the Court awarded that he should have 40*l.* more. See also *Thorogood* v. *Scroggs*, Cro. Eliz. 582. which is to the same effect.

BATES v. HUDSON.

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In an action for work and labour in curing a flock of sheep and lambs, consisting of 497, of the scab, it was proved that the plaintiff had declared that he did not expect to be paid unless he cured *all*; and it appearing that forty out of the flock were not cured — Held, that he was not entitled to recover any thing.

ASSUMPSIT for work and labour. Plea, the general issue. At the trial before *Alexander*, C. B. at the last assizes for *Hertfordshire*, the plaintiff proved that he had been employed by the defendant to cure a flock of sheep and lambs, of a disease called the scab, at so much per head for the sheep and so much for the lambs. The flock consisted of 350 sheep and 147 lambs. General evidence was given that the plaintiff had performed his contract. On the part of the defendant it was proved that the plaintiff, at the time he undertook the task, declared that he did not expect to be paid unless he cured *all* the sheep and lambs. Proof was then given that the plaintiff had completely failed in curing at least forty out of the flock. The Lord Chief Baron told the jury that, if they believed the agreement on the part of the plaintiff to have been that he would cure all the sheep at all events, (that being an entire contract,) he would be entitled to recover nothing, if it turned out that some of the flock were not cured. The jury found that the complaint had been checked, but not entirely subdued, whereupon a verdict was entered for the defendant.

The Hon. C. *Law* now moved for a rule nisi to set aside

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the verdict and obtain a new trial on the ground of misdirection. He contended that this being an action of assumpsit for work and labour, the plaintiff was entitled to recover pro tanto, notwithstanding the agreement proved by the defendant.

ABBOTT, C. J.—The plaintiff appears to have insisted upon recovering his demand for curing all or none. He did not distinguish between those which he had, and those he had not cured. If he went for all or none, then I think the Lord Chief Baron's direction was right. The rest of the case was a question of evidence, and I cannot say that the verdict is wrong.

PER CUR.

Rule refused.

Wednesday, April 20.

Assumpsit for work and labour lies at the suit of a certificated conveyancer, to recover his fees.

DAVIES *v.* SIBLY.

ASSUMPSIT for work and labour by the plaintiff as a certificated conveyancer, for his fees. Plea, the general issue. At the trial before *Abbott*, C. J. at the *Middlesex* sittings after last *Hilary* term, the plaintiff had a verdict.

W. E. Taunton now moved to enter a nonsuit on the ground that a certificated conveyancer could not maintain an action for his fees, and he cited *Jenkins* v. *Slade* (*a*), where that doctrine is reported to have been laid down by *Best*, C. J. in [illegible].

ABBOTT, C. J.—The late case of *Poucher* v. *Norman* (*b*) has settled this point, and acting upon that decision, you must take nothing by your motion.

PER CUR.

Rule refused.

(*a*) 1 Carrington's N. P. C. 270.

(*b*) Ante, vol. v. 648.

TURNER v. HAYDEN, and another.

Wednesday, April 20.

The holder of bills of exchange, accepted payable at a banking-house, neglected to present them there when due, and the bankers, in whose hands the acceptor had funds, having afterwards failed:—Held, that the acceptor was still liable, there being no obligation on the part of the holder to present them at the banking-house or to the acceptor at the time they became due.

THIS was an action of assumpsit by the indorsee of two bills of exchange, against the acceptor. Plea, non-assumpsit. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Hilary* term, the case proved in evidence was this:—The defendant banked at the house of Messrs. *Marsh*, *Stracey* and Co. of *Berners-street*, *Oxford-street*, and accepted the bills (which together did not amount to 100*l*.) payable at that house. The bills respectively became due on the 21st and 31st of *August*. At those times and up to the 13th of *September*, when *Marsh* and Co. stopped payment, the defendant had a balance in his bankers hands exceeding the amount of the bills. The plaintiff never presented the bills for payment either at the banking-house or to the defendants until the 21st of *September*, on which day he demanded payment of the defendants, which was refused. Both parties resided in *London*. On behalf of the defendants it was contended, under these circumstances, that the liability of the defendants was discharged in consequence of the laches of the plaintiff, in not presenting the bills either at the banking-house, or to the defendants themselves within a reasonable time after they became due, for by such neglect the defendants had been damnified. The Lord Chief Justice was of opinion that the defendants, as acceptors, were still liable, and the plaintiff not being bound to present the bills at the bankers, it could not be predicated of him that he was guilty of laches so as to discharge the defendants. The plaintiff therefore had a verdict, but with liberty to the defendants to move to enter a nonsuit.

Scarlett now moved accordingly to enter a nonsuit. The circumstances of this case distinguish it from former decisions. Here the defendants have actually sustained an injury in consequence of the plaintiff's neglecting to present

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the bills at the banking-house within a reasonable time after they became due. It is not contended that they were bound to present the bills at the bankers on the very days they respectively became due; but having neglected so to do, they were bound to give the defendants notice of the fact. The plaintiff knew that the defendants were in the habit of making their bills payable at a banker's. It was, therefore, incumbent on the plaintiff to present the bills to the bankers, who, for this purpose, were the defendants' agents for paying money on their account. This case must be governed by the same rule which applies to a banker's check. If the holder of a check upon a banker neglects to present it within a reasonable time, and the drawer thereby sustains a loss, the latter is discharged. So also the holder of a bill of exchange is bound to present within a reasonable time, and if he omits so to do, to the prejudice of the acceptor, the latter is not liable. An acceptance of a bill of exchange payable at a banker's is equivalent to a check (*a*). Admitting that the plaintiff was not bound to present the bills at the bankers, still he ought to have given notice to the defendants, although, certainly, in *Sebag* v. *Abitbol* (*b*), it was decided that the acceptor was not discharged notwithstanding he had received such notice. The question is, whether this case comes within the statute 1 & 2 *Geo.* 4. c. 78. and is to be treated as a general acceptance.

ABBOTT, C. J.—My Lord *Ellenborough's* definition of *laches*, as given in *Sebag* v. *Abitbol*, is this:—"Laches is a neglect to do something which by law a man is obliged to do. Whether my neglect to call at a house where a man informs me that I may get the money, amounts to laches, depends upon whether I am obliged to call there." This definition is applicable in express terms to the present case. I think there was no obligation on the part of the plaintiff

(*a*) See *Bishop* v. *Chitty*, 2 Str. 1195. and *Fenton* v. *Goundry*, 13 East, 459.

(*b*) 4 M. & S. 462.

to present these bills at the house of *Marsh* and Co.; and as I am unable to distinguish this case from *Sebag* v. *Abitbol*, I think we ought not to grant any rule.

BAYLEY, J.—I am of opinion that the verdict in this case was perfectly right. Before the 1 & 2 *Geo*. 4. c. 78. was passed, it had been repeatedly held that it was not incumbent on the holder of such acceptances as these to prove that he had presented them at the banker's where they were made payable; and not being bound to prove it, there was no obligation on him in fact so to present them. Here, therefore, the plaintiff was not guilty of such negligence as would deprive him of his remedy against the acceptor. But the late statute says that such acceptances as these shall have the effect of general acceptances, and entitles the holder to demand payment of the acceptor, whether they are made payable at a banker's or not. An acceptance payable at a banker's is to be deemed for the benefit of the person who makes it; it is an act of his own doing, and imposes no obligation on the holder to present it at the banker's on the very day it becomes due, in order to charge him, the acceptor. It is the duty of an acceptor making his bills payable at a banker's, to see from time to time how his account stands; and if these defendants had, between the 31st of *August* and the 13th of *September*, inquired how their account stood, they would have seen that these bills had never been presented, and then they might have drawn out the amount so as to meet the bills when they should have been presented. The funds in the hands of their bankers were always in that interval under their own control. I think there was no laches on the part of the plaintiff, because he was not bound to present the bills where the defendants had, for their own convenience, made them payable.

LITTLEDALE, J. (*a*) was of the same opinion.

Rule refused.

(*a*) *Holroyd*, J. was absent.

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Where a person having lost a bill of exchange, which he supposes to have been stolen, goes before a magistrate, and relates the circumstance of the loss, and the magistrate grants his warrant to apprehend *A. B.* on a charge of having "feloniously stolen, taken and carried away the bill of exchange, (language which the complainant did not use when he laid his information), and upon subsequent investigation of the case it turned out to be no felony:—Held, that case would not lie for maliciously procuring the magistrate to grant his warrant. To sustain the averment of malice the charge must be *wilfully false*.

Informations before magistrates must be taken as nearly as possible in the language used by the party.

COHEN *v.* MORGAN.

CASE against the defendant for falsely, maliciously, and without any probable cause, procuring the warrant of a justice of the peace, to apprehend the person of the plaintiff on a charge of feloniously stealing, taking and carrying away a certain bill of exchange, and thereby causing him to be imprisoned. Plea, not guilty. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last term, it appeared from the evidence of the justice's clerk, that, on a day mentioned, the defendant appeared at the justice-room in *Whitechapel*, and stated his complaint to the sitting justice of having lost a bill of exchange to the amount of 15*l*. The witness took the information of the defendant down in writing, in which the charge stated against the plaintiff was that he had "feloniously stolen, taken and carried away" the bill of exchange. The words "feloniously stolen, taken and carried away," were not used by the defendant. This was the witness's own language. Upon this information the justice granted his warrant, to apprehend the plaintiff on a charge of felony, which charge was couched in the language above-mentioned. The parties afterwards appeared before the justice, and upon an investigation of the merits of the case, the complaint was dismissed, the justice being of opinion that there was no ground for charging the plaintiff with a felony. Under these circumstances the Lord Chief Justice held that there was no evidence to go to the jury that the defendant was actuated by malicious motives, and therefore directed a nonsuit.

Gurney now moved for a rule nisi to set aside the nonsuit, and submitted that although it was not made out that the defendant was actuated by malice in the first instance in going before the magistrate, still the fact of his persevering in the charge when the plaintiff was brought before the jus-

tice, and then giving a more detailed account of the transaction, was sufficient to go to the jury as evidence of a malicious motive.

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ABBOTT, C. J.—It appeared to me at the trial that the defendant had taken that which was the proper course. He had lost a bill of exchange, and had reason to suppose that the plaintiff had improperly possessed himself of it. Under this supposition he went before the justice, and related the facts and circumstances of the loss. It was for the justice to say whether those facts amounted to a felony, and to determine whether he would or would not issue his warrant to apprehend the party accused. After the defendant had related the facts of the case, the justice's clerk, instead of writing down what the man really said, wrote down what he took to be the fact, as mere matter of assumption. The defendant never used the words "feloniously stolen, taken and carried away," according to the language of the information. There was nothing in the defendant's conduct to shew that he was influenced by malice. To support the averment of malice, it must be shewn that the charge is wilfully false. But here, according to the evidence, the defendant merely related his story to the magistrate, leaving it to him to determine whether the facts amounted to a felony. I noticed at the trial the practice of drawing up informations in the manner in which the information in this case was drawn up. I thought it highly improper, and think so still. It is the duty of the justice's clerk to write down in the information what a witness says, as nearly as possible in the language used by the party, and not to frame the deposition in language in which no person, in common parlance, can be supposed to express himself. I think there is no ground for disturbing the nonsuit.

The other judges concurred.

Rule refused (*a*).

(*a*) Vide *Elsee* v. *Smith*, ante, vol. i. 97.

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Thursday, April 21.

TRIMMER *v.* The INHABITANTS of The HUNDRED of MUTFORD.

An affidavit by the owner of premises wilfully set on fire, "that he does not know the person or persons who wilfully set fire to his premises;" but not adding, *or any of them;* does not satisfy the 9 *G.* 1. c. 22. s. 8. and will not support an action against the hundred for compensation.

THIS was an action on the case, on the statute 9 *Geo.* 1. c. 22. to recover from the hundred of *Mutford,* in the county of *Suffolk,* the value of certain premises of the plaintiff, which had been wilfully destroyed by fire, within the hundred, by some person or persons unknown. At the trial before *Gaselee,* J. at the last *Suffolk* Assizes, the plaintiff succeeded in establishing his case, except that, upon the production of the attested copy of his examination before the magistrates, taken pursuant to the statute, it appeared that he had deposed to his ignorance of the persons who had committed the offence, in these words: "And this deponent further saith that he doth not know the person or persons who wilfully set fire to his premises;" and an objection being taken that this was not a sufficient allegation to satisfy the requisitions of the 8th section of the statute (*a*), the learned judge was of that opinion, and accordingly nonsuited the plaintiff, with liberty, however, to move to enter a verdict in his favour, with £200 damages, if the Court should be of opinion that the objection was untenable.

Frere, Serjt. now moved accordingly, and contended that the allegation objected to was framed virtually and substantially in conformity with the statute. The only cases bearing upon this point, namely, *Rex* v. *The Hundred of*

(*a*) Which provides, that "no person shall be enabled to recover damages, unless he shall by himself or servant, in two days after the damage done, give notice of the offence unto some of the inhabitants of some town, village, or hamlet near to the place where the fact was committed; and shall in four days after such notice give in his examination on oath, or the examination on oath of his servant who had the care of the same, before a justice inhabiting in or near the hundred, whether he knows the person or persons that committed the fact, *or any of them,*" &c.

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Bishop's Sutton (*a*), and *Thurtell* v. *The Hundred of Mutford* (*b*), in the latter of which the former was cited and commented on, are essentially different from the present, for in both those cases the party swore only that *he suspected* the fact was committed by some person or persons unknown; which was clearly insufficient. Certainly the statute does contain the words, " or any of them," but it does not profess to give the precise form to be observed; and an allegation that a man does not know the person or persons, is in substance and effect the same, as if he went on to say, or any of them.

BAYLEY, J. (*c*)—In all actions of this kind the directions of the statutes on which they are founded must be strictly and literally pursued. That rule was laid down by Lord *Ellenborough* in *Thurtell* v. *The Hundred of Mutford*, and is consistent with every principle of sense and justice. Supposing that there were three persons jointly concerned in causing this fire, and the plaintiff well knew one of them, this affidavit would not support an indictment for perjury against him, for though it would then be morally false, it would still be truly sworn in the terms of it, and it was doubtless to meet the possibility of such cases as that occurring, that the legislature inserted in this section of the statute the words " or any of them," which the plaintiff has by some inadvertence omitted in his affidavit. I am therefore of opinion that the plaintiff has not sufficiently pursued the directions of the statute, and that the nonsuit was right.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule refused (*d*).

(*a*) 2 Stra. 1247. (*b*) 3 East, 400. (*c*) *Abbott*, C. J. was absent.
(*d*) Vide *Reed* v. *The Hundred of Gainsbury*, ante, vol. iv. p. 250.

NICHOLSON *v.* COGHILL.

A. arrested *B.*, for money paid to his use on the 10th of *December;* was ruled to declare on the 17th; filed a declaration on the 24th; and discontinued the action, upon payment of costs, on the 31st:—Held, in case for a malicious arrest, that this was sufficient primâ facie evidence of malice and want of probable cause.

CASE for a malicious arrest. Plea, not guilty, and issue thereon. At the trial before *Bayley*, J. at the last *Yorkshire* assizes, the case was this. On the 7th of *December*, 1824, *Coghill* levied his plaint against *Nicholson* in the sheriff's court at *York*, and caused him to be arrested upon an affidavit of debt for money paid to his use. The court was held weekly, on *Friday*. On the 17th *Coghill* was ruled to declare. On the 24th he filed his declaration, to which *Nicholson* pleaded, and gave a rule to reply, and on the 29th *Coghill* caused *Nicholson* to be discharged out of custody, and on the 31st he discontinued his action upon payment of costs. It was contended on the part of the defendant, that these facts supplied no evidence, either of malice or want of probable cause, and therefore that the plaintiff must be nonsuited; but the learned judge being of opinion that it lay upon the defendant to shew that he had probable cause for the arrest, overruled the objection, and the plaintiff obtained a verdict, with leave for the defendant to move the Court to enter a nonsuit.

Holt now moved accordingly. The rule in actions of this kind is, that the plaintiff must prove the existence of malice, and the absence of probable cause; for unless those facts are shewn, he has no cause of action. *Gibson* v. *Charters* (*a*).—[*Bayley*, J. The plaintiff in that case had a good cause of action originally, but the debt was paid before the arrest was actually made.] There is another case precisely in point, *Sinclair* v. *Eldred* (*b*); in that case the plaintiff had been arrested, and discharged upon his attorney's undertaking to put in bail; and, afterwards, the defendant suffered judgment of non pros. to go against him. The plaintiff obtained a verdict upon this evidence, but the

(*a*) 2 B. & P. 129. (*b*) 4 Taunt. 7.

Court afterwards made a rule for entering a nonsuit absolute, when Lord *Mansfield* said, "I do not think that the circumstance of not proceeding in an action is, alone, evidence sufficent to support this action, and to prove malice; such a circumstance is very consistent with the case of a person who might have an acknowledgment of debt contained in a letter, which might be lost since the commencement of the action, or, with the death of a witness who alone was able to prove the debt; and so the party may be deprived of all the means of proceeding. There never has yet been a case, where the mere not proceeding in an action has been held evidence of itself alone sufficient to support this action." That reasoning seems perfectly applicable to the present case. Actions for malicious arrests, and actions for malicious prosecutions, stand upon the same footing, and in the latter the plaintiff must prove both malice and want of probable cause, and the proving an acquittal for want of prosecution is not primâ facie evidence to support such an action. *Purcell* v. *Macnamara* (a).

Abbott, C. J.—It seems to me that there was such evidence produced at the trial of this cause, as rendered it incumbent on the learned judge to leave the questions of malice and of the want of probable cause to the jury. This case is distinct from all those cited in this respect, that here the defendant took a step on his own part towards terminating the first action, for he voluntarily discontinued it. The particular facts and dates which appeared in evidence are also material to be considered. The affidavit of debt and the arrest were both made on the 7th of *December*; *Coghill* was ruled to declare on the 17th, and did declare on the 24th, and discontinued the action on the 31st. The interval, therefore, between the arrest and the discontinuance was extremely short, and does not warrant the supposition that any change of circumstances had occurred to destroy *Coghill's* means of proving his right of action. It must, con-

(a) 9 East, 361.

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sequently, be presumed, that he acted from the first either through mistake or from malice, and that was undoubtedly a question of fact for the jury. Then, looking at the dates in the transaction, and at the facts that *Nicholson* was throughout anxious to proceed in the action, and that *Coghill* on the contrary voluntarily discontinued it, I cannot say that the jury have drawn the wrong conclusion.

HOLROYD, J.—Two ingredients are indispensably necessary to the maintenance of an action of this kind, malice and want of probable cause; and the plaintiff must produce such evidence of both, as will fairly enable the jury to infer them. In this case I think there was some evidence to that effect, and that in the absence of any contradictory evidence on the part of the defendant, it was sufficient to warrant the jury in finding for the plaintiff. If the defendant had a reasonable ground for discontinuing the former action, that fact was peculiarly within his knowledge, and the onus of proving it lay upon him. It has been long held in actions for malicious prosecutions, that evidence of the grand jury having thrown out the bill, justifies the inference of the want of probable cause, and that it is for the prosecutor to rebut that inference by contrary proof on his part. I think this is an analogous case, and that the discontinuance of the former action, being the act of the present defendant, and not explained by him, justified the jury in presuming the existence of malice and the absence of probable cause.

LITTLEDALE, J.—I think the plaintiff made out a sufficient primâ facie case to support the action. The defendant discontinued the former action upon payment of costs. That was a voluntary act on his part, and was, in my opinion, unless explained, or refuted by him, conclusive evidence of malice. The onus of proving a probable cause for the arrest lay on him. In *Sinclair* v. *Eldred* the discontinuance of the first action was by means of judgment of non pros., and the plaintiff might have suffered that to be signed through mis-

take, and without intending to abandon his action. Here there could be no mistake, the discontinuance must have been intentional.

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BAYLEY, J.—I thought at the trial that I was not justified in calling upon the plaintiff to give further evidence than he did, and I continue of the same opinion still. He was arrested upon an affidavit of debt for money paid to his use; the cause of action therefore was peculiarly within the knowledge of the defendant, but might not be by any means so evident to the plaintiff. The onus, therefore, of proving a probable cause of action lay upon the defendant, and in the absence of such proof, and considering the dates and facts of the case, the whole appears to me to form a proper question for the decision of the jury. Mr. Justice *Buller*, in his treatise, speaking of actions for malicious prosecutions, says, where the facts be in the knowledge of the defendant himself, he must shew a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice (*a*). That rule appears to be strictly applicable to the present case, and if so, the verdict which has been found for the plaintiff, certainly ought not to be disturbed.

Rule refused. (*b*)

(*a*) Bull. N. P. 14. (*b*) Vide *Ravenga* v. *Mackintosh*, ante, vol. iv. 187.

MASEL v. ANGEL.

Thursday, April 21.

Where there was a submission to two arbitrators, with power to them to name an umpire, if they could not agree, so as the umpire made his award on or before a certain additional day, and the arbitrators having named an umpire who made an award in the plaintiff's favour, *but after the time limited had expired*, and the plaintiff held the defendant to bail, without stating in his affidavit the fact of the time having expired:—Held, that the defendant was not entitled to be discharged on filing common bail.

C. CRESSWELL moved to discharge the defendant out of custody on filing common bail, on the ground of the insufficiency of the affidavit of debt, upon which he had been

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arrested. There had been a reference, by bond, of all matters in difference to two arbitrators, with power to them to name an umpire, if they could not agree among themselves by a certain day, the umpirage to be binding, provided the umpire made his award on or before a subsequent day. The arbitrators, having disagreed among themselves, named an umpire who made an award in the plaintiff's favour, but after the day limited had expired, notwithstanding which the plaintiff held the defendant to bail. The fact of the time having expired did not appear upon the face of the affidavit, but it was submitted that the circumstance being now sworn to was sufficient to discharge the defendant on common bail. He cited *Smailes* v. *Wright* (a).

ABBOTT, C. J.—The Court is not called upon to determine whether the award of the umpire is good. All that we are at present to consider is, whether the affidavit on which the defendant has been held to bail discloses a good and sufficient cause of action against him. It may be that the cause disclosed may be defeated hereafter; but that is quite another matter. Here the affidavit discloses that there was a reference to two persons with power to them to appoint an umpire, who was to make his umpirage on or before some additional day. The affidavit states, that the arbitrators, not agreeing among themselves, appointed an umpire who made an award in the plaintiff's favour. That, in my opinion, is sufficient to shew, primâ facie, that the plaintiff has rightly held the defendant to bail, although upon future consideration of the case it may turn out that the plaintiff has no cause of action.

PER CUR.

Rule refused.

(a) 3 M. & S. 559.

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B. STIERNELD v. HOLDEN and another.

Thursday, April 21.

Where the consignee of goods from abroad authorized a factor to indorse the bills of lading for the purposes of sale, and the factor indorsed them to *H.* & Co. (who knew that the latter was a mere agent,) with authority to them, first, to effect sales, and second, to reimburse themselves out of the proceeds for a sum of money which they advanced upon the credit of the goods; and before the authority of the factor (who immediately afterwards stopped payment) was countermanded, *H.* & Co. sold the goods by auction:—Held, that *H.* & Co. were not liable to the original consignee in *trover* for the goods. It seems, however, that they would be liable for money had and received to the use of the rightful owner of the goods.

THIS was an action of trover for eight bags of coffee. Plea, not guilty. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last term, the case proved in evidence was this:—The plaintiff was agent for the creditors of an estate at *Demerara*, and was in the habit of receiving consignments of the produce for sale in this country. In *September*, 1823, the plaintiff went to *France*, but on his departure he, by writing, authorized *W. Stewart*, a merchant in *London*, to open his letters, and indorse in his name any bills of lading which might come from *Demerara*, and to sell the goods consigned. *Stewart* himself sometimes received consignments direct from the estate, and at other times bills of lading came to him through the plaintiff, and also acted as agent for the creditors, on which occasions he usually employed the defendant to effect sales. On the 25th of *November*, 1823, *Stewart* received a letter from the consignor of the coffee in question, addressed to the plaintiff, containing the bills of lading. He opened the letter, and next day indorsed and delivered the bills of lading to the defendants, who advanced him 1,500*l*. by their acceptance at three months, which he discounted. He had received no money from them until he had deposited the bills of lading. They knew that he was not the owner of the goods, and that they had been in fact consigned to the plaintiff. At that time he, *Stewart*, was under engagements for the *Demerara* estate beyond the amount of the 1,500*l*., which he applied, as he said, to meet those engagements generally. At the time he received the acceptance from the defendants, he expressly authorized them to sell the coffee and to reimburse themselves out of the proceeds. One of the engagements he was under fell due on that very day, namely, a bill of exchange for 500*l*. which he retired with part of the money.

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On the 28th of *November* he stopped payment, and on the 3d of *December* the defendants sold the goods by auction for 1,508*l.* 7*s.* 9*d.*, but at this time they did not know that *Stewart* had stopped payment. On the 6th of *December*, the plaintiff, having returned from *France*, sent the defendants notice not to sell the coffee. Under these circumstances the Lord Chief Justice was of opinion that trover was not maintainable; for, as *Stewart*, being authorized himself to sell the coffee, had authorized the defendants to sell it for him, and they had in fact sold it before the original authority was countermanded, there was no conversion to support this form of action, whatever might be the defendants' liability in assumpsit for money had and received. His lordship therefore directed a nonsuit, with liberty, however, to the plaintiff to move to enter a verdict for 1,508*l.* 7*s.* 9*d.*

Marryat now moved accordingly. The question is, whether there has been such a conversion in this case as will support the action of trover. It cannot be denied that *Stewart* was a mere factor, and, consequently, had no authority to pledge the coffee. This must be treated as the case of a mere pledge, and coming within the principle of *M'Combie* v. *Davies* (*a*), *Truettel* v. *Baranden* (*b*), *Featherstonehaugh* v. *Johnson* (*c*), and that class of cases. It is true that the defendants were authorized by him to sell, but then that authority was accompanied with the right of reimbursing themselves out of the proceeds, which *Stewart* was not entitled to confer. Admitting, for the sake of argument, that the authority to sell was not countermanded by the plaintiff until the 3d of *December*, still the very act of accepting the bills of lading from *Stewart* was itself a conversion, and sufficient to support trover. If this were not so, the consequence would be that every merchant who puts his goods into the hands of a factor for sale would be in a worse situation than if he sold them in the ordinary course

(*a*) 6 East, 538. (*b*) J. B. Moore, 543.
(*c*) 2 Id. 181. 8 Taunt. 237. S. C.

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of business. [*Bayley*, J. Did you prove that the defendants sold the goods sooner than they ought to have been sold?] There certainly was no evidence that the sale was premature; but here the defendants, knowing that *Stewart* was a mere factor and authorized only to sell, gave him their acceptance payable at three months, coupled with a condition that they might immediately sell and reimburse themselves if they thought proper. There was nothing unfair as far as respects the sale of the goods by auction on the 3d of *December*, but what the plaintiff complains of is, that his situation was altered by being prevented from receiving the proceeds of the goods. If the defendants merely took the goods for sale, unaccompanied by any pledge, then probably there would be no illegal conversion, but by aiding the illegal purpose of *Stewart* in advancing him 1,500*l.* in anticipation of the proceeds, they are liable to this form of action. The objection is, that the defendants received the goods without any legal authority to sell, inasmuch as they took them knowingly with a stipulation to reimburse themselves for money advanced to a mere factor. [*Abbott*, C. J. You are arguing this case as if the delivery of the goods to the defendants was against the plaintiff's right. He was not the owner of the goods.]

BAYLEY, J.—It appears to me upon the evidence given at the trial, that the nonsuit was right. There are two objections to the plaintiff's right of recovering; first, that he never had any interest in the goods; and second, that the form of action instead of being trover ought to have been assumpsit for money had and received. The goods are sent to this country under billsof lading to the plaintiff. He gives an authority to *Stewart* to indorse them, and no doubt the latter had no right to indorse them for any purpose of his own; but he had authority to indorse them in order that the goods might be sold, and the proceeds received by him for the benefit of the right owner. The bills of lading are indorsed by *Stewart* to the defendants in order that they may sell the coffee, and then he gives them authority to pay

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themselves out of the proceeds an acceptance for 1,500*l.* which they had at that time given him. This would undoubtedly be a pledge as against the right owner of the coffee, and the pledge would be void, but the authority to sell was a good and valid authority. The defendants sell under the authority given them by *Stewart*, derived from the plaintiff. It is true that the defendants sell them in order to cover the acceptance they had given to *Stewart*, but it is admitted that they sold them honestly and bonâ fide, and in the common and ordinary way in which goods of this description are usually sold. It is clear that they had authority to sell, because the person indorsing the bills of lading to them was acting within the scope of his authority; and that is an answer to this form of action. Two authorities appear to have been given to the defendants, one to sell, and the other to appropriate the proceeds to reimburse themselves the money advanced to *Stewart*. If the defendants had no right of sale, the sale would have been void and trover would lie, but the sale being valid and authorized, although the application of the proceeds was wrongful, still there is no conversion to sustain trover. I am therefore of opinion that this action cannot be maintained.

HOLROYD, J.—I am of the same opinion. There was no wrongful conversion.

LITTLEDALE, J. concurred.

Rule refused.

Thursday, April 21.

LOWEN *v.* KAYE.

The general highway act, 13 *G.* 3. c. 78. ss. 6 & 63. does not authorize the surveyor to widen a road to thirty feet by removing a fence, unless the fence, supposed to be an encroachment, is actually *upon* the highway.

THIS was an action of trespass for breaking and entering the plaintiff's close and pulling down his fences. Plea, the general issue. At the trial before *Alexander*, C. B., at the

last assizes for the county of *Hertford*, it appeared in evidence that the plaintiff occupied a house and premises by the side of a public road, in the parish of *Cheshunt*, leading from the latter place to *North Haw*, in the county of *Middlesex*. In 1773 the place where the alleged trespass had been committed, was part of the waste of the manor. About the year 1815 the garden fence of the plaintiff's house was removed further in front, to within the distance of fifteen feet from the supposed centre of the road, leaving the road in fact only twenty-four feet in width instead of thirty. The defendant, in his character of surveyor of the highways, gave the plaintiff the notice required by the 6th section of the General Highway Act, to remove the fence, for the purpose of widening the road, and the plaintiff neglecting to do so, the defendant caused it to be pulled down. In removing the fence, the workmen employed came to some hard gravel, from which an inference was supposed to arise that the locus in quo had formerly been part of the road. By the 13 *Geo*.3. c.78. s.6. "no tree, bush or other shrub shall be permitted to stand or grow in any highway within the distance of fifteen feet from the centre thereof (except for ornament or shelter to the house, building or court-yard of the owner thereof) or hereafter be planted within the distance aforesaid; but the same shall respectively be cut down, grubbed up, and carried away, by the owner or occupier of the land or soil, within ten days after notice to him or his agent by the surveyor, on pain of forfeiting for every neglect the sum of ten shillings." Section 63, after reciting that inconveniences had arisen from making hedges or other fences, and from ploughing or breaking up the soil of lands or grounds near the middle or centre of highways, proceeds to enact "That if any person shall encroach by making or causing to be made, any hedge, ditch, or other fence, *on* any highway, not being turnpike road, within fifteen feet from the middle or centre thereof, &c. where the breadth of such highway is formed and marked or described with certainty, and does not exceed in breadth thirty feet, every person so

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offending shall forfeit for every such offence forty shillings, &c.; and it shall be lawful for the surveyor who hath the care of any such road, to cause such hedge, ditch or fence, to be taken down or filled up at the expense of the person or persons to whom the same shall belong." It was contended that these two sections justified the defendant in the act of trespass complained of, inasmuch as the legislature manifestly intended that there should be neither trees nor fences within fifteen feet of the centre of the road, and that where a road was less than thirty feet in width, the surveyor might remove all encroachments. The Lord Chief Baron, in summing up the case for the jury, told them that the question for their consideration was, whether the fence which the defendant had removed, stood *upon* what was old road, or upon the plaintiff's own soil, for if they were satisfied it stood upon the plaintiff's own soil, and not *upon* the old road, then, in his opinion, the plaintiff was entitled to a verdict. The jury found their verdict for the plaintiff, damages 5*l*.

Jessopp now moved to enter a nonsuit, (the point having been saved,) or for a new trial, on the ground of misdirection. Under the authority given by the 6th and 63d sections of the General Highway Act, the defendant was justified in removing the plaintiff's fence, so as to make the road thirty feet in width. Whether the fence stood upon what had been part of the old road, or upon the plaintiff's own soil, could not enter into the question, as far as respects the authority of the defendant. [*Littledale*, J. Do you mean to say that the surveyors of highways may go and widen every road, in their parishes, respectively, to the width of thirty feet?] It is submitted that this authority is given by the 13 *Geo*. 3. c. 78. ss. 6 and 63. If it is an old inclosure, a compensation must be given to the party; but if the surveyor is empowered to remove nuisances and obstructions, the act of parliament will be nugatory if he has no power to remove an encroachment like the present.

ABBOTT, C. J.—The power of widening a narrow highway, is perfectly distinct from that of removing fences or other encroachments on the highway, and there is a different mode of carrying each into execution. The language of the 63d section is, that if any *fence* (taking that as the general word) shall be placed *on* any highway,—not if it shall be placed within fifteen feet of the centre of the highway, but if it shall be placed *on* the highway, the surveyor shall have power to remove it. The question, therefore, made at the trial (and it was most properly made) was, whether this fence was placed *on* the highway. If it was placed on the highway, the surveyor was justified in removing it under the authority of the 63d section; but if it was not placed on the highway, the plaintiff was entitled to damages for the act done without lawful authority. I am clearly of opinion that the construction put upon the act by the Lord Chief Baron was perfectly right; and that instead of nonsuiting the plaintiff, he properly left it as a question of fact to be decided by the jury, who have, in my opinion, decided it most correctly.

BAYLEY, J.—The General Highway Act does not direct that *every* highway shall be thirty feet wide; but it contains two provisions; one with reference to trees and shrubs, which though not standing or growing *upon* the highway, may, from being near the highway, produce a mischief by overshadowing and preventing the air coming to it, and therefore with reference to them, whatever be the width of the highway, the 6th section enacts " that no bush, tree, &c. shall be permitted to stand or grow in any highway within the distance of fifteen feet from the centre thereof." But if the subject of encroachment be a hedge, ditch, or other fence, the provision is different. The only provision by the 63d section is, " that if any person shall encroach by making any hedge, ditch, or other fence,"—not *within* fifteen feet of the centre of the road, but " *on* any highway, any person so offending shall be liable to a penalty," &c. Before, there-

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fore, the surveyor can be justified in removing a fence supposed to be an encroachment, he must first ascertain whether it is *on* the highway, for if it is not, then he has no authority to remove it. It seems to me that this fence was not *on* the highway, and therefore that the verdict was right.

HOLROYD, J. was of the same opinion.

LITTLEDALE, J.—If the argument on which this motion is founded could be maintained, it would go to this, that in every case where the road is not thirty feet wide, the surveyor may make it that width by removing the fences on each side. Now the act of parliament gives the surveyor no such authority, unless the fence be actually *upon* the highway.

Rule refused.

Thursday, April 21.

M'GINNIS *v.* M'CURLING.

If a defendant be held to bail for a debt which is clearly and manifestly not due, it seems the Court will discharge him out of custody; but in general they will not try the merits on affidavit.

THE defendant in this case had been held to bail on an affidavit of debt, made at *Liverpool* by an agent of the plaintiff, who resided in *America*, the affidavit alleging that the defendant was justly and truly indebted to the plaintiff on a promissory note drawn by the defendant, payable to the plaintiff on a certain day then past. A rule nisi having been obtained for discharging the defendant on common bail, on an affidavit stating that the debt for which the defendant had been arrested had already been discharged and satisfied, (which was denied by the plaintiff's agent,) the question was, whether, under such circumstances, the Court would discharge the defendant out of custody, the case of *Nizetich* v. *Bonacich* (*a*) being cited in support of the motion.

ABBOTT, C. J.—The general rule of law, and the long

(*a*) 5 B. & A. 904.

established practice of the Court, on an application to discharge a defendant out of custody upon civil process, has been, not to try the merits of the case upon affidavits. Two exceptions to that general rule have occurred in modern times. I remember the first was where Mr. *Scarlett* moved to discharge a defendant out of custody, under very peculiar circumstances. The affidavit to hold to bail, which was for a very large sum of money, was made by a person who was a prisoner in the *Fleet*. On shewing cause against the rule, such facts were disclosed upon the affidavits as manifestly tended to shew that there could be no such claim as the plaintiff had set up against the defendant. The sum being very large, and much greater than the defendant could procure sufficient bail for, the Court interposed and directed him to be discharged. There was afterwards an indictment for perjury against the two persons concerned in making the affidavit of debt, and both were convicted and punished for their offence. The other case was *Nizetich* v. *Bonacich*, which was very different from this. There the plaintiff, who made the affidavit of debt, was actually in custody as a prisoner for debt in the King's Bench prison, and having applied to the Insolvent Debtor's Court for his discharge, had in his schedule, filed in that court, represented the defendant's firm as his creditors to the amount of 4,000*l*. In a letter also, which was produced, the plaintiff stated, under his own handwriting, that the defendant's firm were his principal creditors. The defendant, who was a foreigner, having come to this country, the plaintiff arrested him upon a bill of *Middlesex*, indorsed for bail for 2,000*l*. In that case, it appearing to be perfectly clear and plain that there was no debt due, the Court felt itself at liberty to interpose on the defendant's behalf, and order him to be discharged; but in giving judgment in that case, the Court specially guarded itself, by saying, that the case was so clear that it could not afford a precedent for any motion of the same kind in future. I cannot say here, that there may not be strong reason to think that this

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note has been satisfied, but the affidavit is so framed as to lead me to an opinion that the defendant may still be really indebted to the plaintiff in a large sum of money, though it may not be recoverable on this note. The agent who makes an affidavit in answer to the application may be somewhat rash in swearing that the debt is still due on the note; but certainly he cannot be expected to give so clear an explanation of the transaction as the plaintiff probably would, if he were in this country. Under all these circumstances, I think our safest course is not to grant the application.

PER CUR. Rule discharged.

Scarlett for the plaintiff; *Campbell* for the defendant.

Saturday, April 23.

ROBINSON v. MEARNS.

It is discretionary with a judge, at nisi prius, whether he will or will not try an idle or frivolous cause, and if he suffers it to be tried, and the plaintiff recovers a legal verdict, it is no ground for disturbing the verdict.

A stakeholder, upon a wager on a horse-race for 20*l.*, is liable to an action for money had and received, if the money be demanded before he pays it over to the winner.

ASSUMPSIT for money had and received, brought to recover back a sum of 20*l.* which had been deposited by the plaintiff in the hands of the defendant as stakeholder, upon a wager on the event of a horse-race. Plea, non assumpsit. At the trial before *Holroyd*, J. at the last assizes for the county of *Cumberland*, it appeared, upon the examination of the first witness, that the race had been run, but there being a dispute between the parties as to which horse had won, the plaintiff demanded his deposit of the defendant, which he refused to pay until the dispute was determined by the Jockey Club; whereupon the defendant's counsel submitted to the learned judge that he ought not to try the cause on account of the illegality of the wager, and cited the case of *Egerton* v. *Furzeman* (*a*), where *Abbott*, C. J. refused to try a similar action respecting a dog-fight, unless the plaintiff could prove that he had de-

(*a*) 1 Ryan & Moody, N. P. C. 213; 1 Carrington, N. P. C. 613. S. C.

manded his money of the stakeholder *before* the dogs fought. The learned judge said he would not try which of the horses had won the race, but in the exercise of his discretion he would try the cause, it appearing that the plaintiff had demanded the deposit of the stakeholder before he paid it over. The plaintiff had a verdict, but leave was given to the defendant to move to enter a nonsuit.

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Patteson now moved accordingly, and contended, first, on the authority of *Egerton* v. *Furzeman*, that the learned judge ought not to have tried the cause, inasmuch as the deposit had not been demanded until *after* the horses had run; and second, that the wager itself was illegal and void, and no action could be maintained respecting it. He cited *Eltham* v. *Kingsman* (*a*), *Lynal* v. *Longbotham* (*b*), *Clayton* v. *Jennings* (*c*), *Brown* v. *Berkeley* (*d*), *Whaley* v. *Pagot* (*e*), *Ximenes* v. *Jaques* (*f*), *Henkin* v. *Guerrs* (*g*), *Johnson* v. *Bann* (*h*), and *Brown* v. *Leeson* (*i*).

ABBOTT, C. J.—There is no doubt that a judge has a right to exercise his discretion whether he will or will not try a cause relating to an idle or frivolous wager, but if he suffers it to be tried, and there is no objection to the plaintiff's recovering, the fact of his having tried it is no ground for disturbing the verdict. Here my brother *Holroyd* does not seem to have doubted that the wager itself was illegal, but the money being demanded before it was paid over, he thought it recoverable on the authority of several decided cases.

BAYLEY, J.—Where a judge thinks fit to try a frivolous cause, if the legal result is right, I do not think the fact of his having tried it affords a ground for disturbing the verdict.

(*a*) 1 B. & A. 683. (*b*) 2 Wils. 36. (*c*) 2 Bl. 706.
(*d*) Cowp. 281. (*e*) 2 P. & P. 51. (*f*) 6 T. R. 499.
(*g*) 12 East, 247; 2 Camp. 408. (*h*) 4 T. R. 1.
(*i*) 2 H. B. 43.

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I hope a judge may by law exercise his discretion whether he will or will not try a case of this kind. On the last circuit which I went, two instances occurred in which I exercised such a discretion, the question in dispute being idle and frivolous. I thought I was not justified in detaining the parties in other cases at a very considerable expense, and in imposing upon the jury the task of wasting their time in determining cases beneath the dignity of a court of justice.

HOLROYD, J.—In this case, it appearing that the plaintiff had demanded his money whilst it remained in the hands of the defendant as stakeholder, I was of opinion that he was entitled to recover it back. I refused to enter into the question whether the wager was won or lost, and I would not permit any evidence to be received upon that subject. Upon looking into the authorities it will be found, that the right of the party to recover back a deposit, paid on a wager, does not depend upon whether the wager be illegal and void, or whether it be won or lost, but upon whether the stakeholder has received it upon an illegal consideration; for if he has, he is bound to refund it. I think the plaintiff was entitled to have his money back, on the ground that it was demanded before it was paid over, the wager itself being illegal (*a*).

LITTLEDALE, J. concurred.

Rule refused.

(*a*) Vide *Smith* v. *Bickmore*, 4 Taunt. 474; *Cotton* v. *Thurland*, 5 T. R. 405; *Howson* v. *Hancock*, 8 T. R. 575; *Aubert* v. *Walsh*, 3 Taunt. 277; and *Bate* v. *Cartwright*, 7 Price, 540.

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THOMPSON v. POOLE.

Tuesday, April 26.

The penalties imposed by the 33d sect. of the coal act, 47 *G.* 3. s. 2. c. 68. cannot be recovered upon information before a magistrate; the jurisdiction of the magistrates being confined to cases where the penalty may be reduced below 20*l.*

THIS was an action of debt upon the 33d section of the Coal Act, 47 *G.* 3. s. 2. c. 68. to recover penalties for selling one sort of coal for another, within the limits prescribed by that act. At the trial before *Abbott*, C. J. at the adjourned *Middlesex* sittings after last term, the plaintiff, having established his case, obtained a verdict for several penalties of £20 each.

Chitty now moved to arrest the judgment, on the ground that the penalties recovered by this verdict might have been recovered in a summary mode by information before a magistrate, and consequently that the plaintiff was bound to have taken that course, and not to put the defendant to the costs of an action. *Rex* v. *Rawlinson*(a) was a case in point; for there the Court granted a mandamus to a magistrate to hear an information upon this statute, although the penalties sought to be recovered exceeded altogether the sum of £20. By s. 146 of the act all fines and penalties not exceeding £20 are directed to be recovered by information before a magistrate, and although the penalties in this case ex altogether the sum of £20, as they did also in *Rex* v. *Rawlinson*, still no one of them exceeded that sum, and therefore they were, within the description of the 146th section, penalties not exceeding £20, and ought to have been sued for by information before a magistrate.

ABBOTT, C. J.—This action was brought upon the thirty-third section of the statute, which is very different in its language and provisions from the hundred and seventeenth, upon which the proceedings in *Rex* v. *Rawlinson* were founded. In all cases arising upon the latter section, the amount of the penalty recoverable from the offending

(a) M. T. 1821, not reported.

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party, depends entirely upon the quantity of coals which he sells, and the magistrate is invested with a discretionary power to inflict the full amount, or to mitigate the penalty according to the circumstances of the case. But the former section imposes a fixed penalty of £20 per chaldron upon each offence, without any discretionary power of mitigation, and consequently the only mode of recovering that penalty is by an action, because the jurisdiction of the magistrates is limited to cases where the penalty is by the law, or may be by mitigation made under £20. There is therefore no ground for the present application.

BAYLEY, J.—The 33d section imposes a penalty of 20*l.* per chaldron upon every offence against its provisions; the 117th section imposes a penalty *not exceeding* forty shillings per sack upon each offence. The two sections therefore are quite different in their operation, for in one there is a power given of mitigating the penalty, and in the other there is not. And *Rex* v. *Rawlinson* is, for the same reason, quite distinct from the present case, for there the penalty recoverable might, if the power of mitigation given by the 117th section was exercised, be reduced to an amount less than 20*l.*; and therefore that case was cognizable by a magistrate, because the magistrate's jurisdiction is not ousted, unless the penalty recoverable must certainly and necessarily be 20*l.* or upwards. In this case the penalty could not possibly be reduced below 20*l.*, therefore the magistrate had no jurisdiction, and the only mode by which the law could be put in force was an action.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule refused.

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Friday, April 29.

COOPER, Clerk, v. WALKER.

An inclosure act empowered commissioners to allot to the rector of the parish of W. cum S. such lands within the township of S., and of the titheable parts of the township of W., as should (quantity, quality and situation considered), be equal in value to two fifteenth parts of the titheable places of the last mentioned lands and grounds, in lieu of tithes belonging to the rector, and arising within those lands and grounds. Another clause saved to all persons, their heirs, &c. (except the persons to whom any allotment should be made by virtue of the act, in respect of the interest or property for which such allotment should be made,) all such estate and interest as they had in respect of the waste lands before the passing of the act. The commissioners allotted to the rector lands in W., lands in S., and lands in A.; such lands were more than two fifteenths of the lands inclosed in S. and A., but less than two fifteenths of the lands inclosed in W., S., and A. No one of the allotments was expressed in the award to be in lieu of the rector's tithes in W.:—Held, that the commissioners had not made the rector any allotment in lieu of his tithes in W., and that his right to tithes in kind there was reserved to him by the saving clause.

THIS was an action brought on the 2 & 3 *Ed.* 6., under an order of the Lord Chancellor, by the Reverend *William Cooper*, Rector of the parish of *Waddingham*, in the county of *Lincoln*, against *William Walker*, an occupier of arable, meadow and pasture lands within that parish, for not setting out the tithe thereon. At the trial, the following facts were proved or admitted:

The plaintiff now is, and since the 29th *September*, 1811, has been, rector of the parish and parish church of *Waddingham*. The defendant, on the 29th *September*, 1811, occupied certain arable, meadow and pasture lands in the township of *Waddingham*, and carried away certain crops of corn, grain and hay, grown on such lands, of the value of 20*l*., without having at any time divided or set forth for the plaintiff any tithes, and without having at any time compounded or otherwise agreed with the plaintiff for or concerning any tithes in respect of the said crops or any part thereof. The parish of *Waddingham* consists of two townships, *Waddingham* and *Snitterby*. Certain proceedings in Chancery, in the year 1700, were given in evidence, consisting of a bill, answer and decree. The bill set out an agreement made between the then rector of *Waddingham* and the owners of certain lands in the parish; that those lands should be inclosed, and that the rector should have a certain portion of the lands, and the annual sum of 94*l*., in lieu of tithes; and this agreement was confirmed, and ordered to be performed by the decree. The lands on which tithes are claimed by the plaintiff in this action, form no part of the lands inclosed under the above-mentioned decree, but were part of the lands inclosed under the act of

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parliament, in 1769, after mentioned. The above-mentioned composition was proved to have been paid from time to time by the occupiers of land in the township of *Waddingham*, and accepted by the rector from that time until the year 1788, when a new rector, Dr. *J. Barker*, the immediate successor of *Robert Carter*, hereinafter mentioned, succeeded; the composition of 94*l*. per annum was then abandoned, and a new composition agreed upon between the said occupiers and the then rector, at a valuation of the whole parish; and such valuation had respect, as well to the lands inclosed under the act of parliament hereinafter mentioned, as those inclosed under the decree. The plaintiff was presented to the rectory of *Waddingham* in 1808, and the defendant paid his share of the composition, in respect of the lands in question, to the plaintiff's predecessor, and to the plaintiff, until the year 1811. From *Michaelmas*, 1811, to *Michaelmas*, 1812, the plaintiff took the tithes in kind, and from *Michaelmas*, 1812, the defendant refused to pay any composition, or set out his tithes in respect of the lands in question.

In the year 1769 an act of parliament, entitled "An Act for dividing and inclosing certain open fields, lands and grounds, in the several townships of *Atterby*, *Snitterby* and *Waddingham*, in the county of *Lincoln*," was passed. That act recited, inter alia, that the Reverend *Robert Carter*, clerk, was at that time rector of the parish and parish church of *Waddingham cum Snitterby*, and as such was seised of certain glebe lands in the said open fields and grounds, and entitled to all the tithes, great and small, ecclesiastical dues, duties and payments, arising within the titheable places of the said parish; and also to the tithes arising upon certain parcels of land lying dispersed in the open fields of *Atterby*; and then enacted that all the said open arable fields, commons, pastures, carrs, and waste grounds, or other open and common grounds in the said several townships, be divided and allotted by certain commissioners appointed to carry the act into execution, and directed such commissioners to assign and allot unto and

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for the said *Robert Carter* and his successors, rectors of the said parish of *Waddingham cum Snitterby*, such parcel or parcels of the said arable fields, common pastures, and carrs within the said township of *Snitterby*, except the common pasture called the *Carr Side*, so directed to be inclosed, as should in the judgment of the commissioners, or any two of them, be equal in value to and a full satisfaction for the present glebe lands of the said rector within the last-mentioned lands and grounds so to be inclosed, and then to assign and allot unto and for the said *Robert Carter* and his successors, rectors as aforesaid, such parcel or parcels of the residue of the same arable fields and common pastures and carrs in *Snitterby* aforesaid, and also of the titheable parts of the said township of *Waddingham*, as shall, quantity, quality and situation considered, contain or be equal in value to two full fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full recompense and compensation for all the tithes, dues, duties, and payments whatsoever belonging to the said rector, and arising, renewing, or happening, or which might arise, renew, or happen, within the same lands and grounds; and further to assign and allot unto and for the said *Robert Carter* and his successors, rectors as aforesaid, such parcel or parcels of the said arable fields of *Snitterby* aforesaid, as by the said commissioners, or any two of them, should, quantity, quality and situation considered, be adjudged to be equal in value to the tithes of the ancient inclosed lands in *Snitterby* aforesaid. The act further directed allotments to be made in the *Carrside* pasture, equal in value to two-fifteenth parts of the titheable grounds, quantity, quality and situation considered, to the rector of *Waddingham cum Snitterby*, and the vicar of *Bishop Horton*, according to their respective shares and interests in the tithes of the said *Carrside* pasture. By the act it was further enacted, that within six calendar months next after the commissioners, or any two of them, should have completed the division and allotments thereby directed to be made, or as soon after as conveniently might

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be, they should form and draw up their award or instrument in writing, which should express distinctly and separately the quantity in statute measures, of the acres, roods and perches contained in the said fields and grounds thereby directed to be so set out and assigned, and also the situation, abuttals and boundaries of the several parcels and allotments respectively by them set out and assigned; and also the situation, abuttals and boundaries of each and every the respective townships of *Atterby, Snitterby* and *Waddingham*, and should contain orders and directions as to the repair of the fences, ditches, gaps, stiles and bridges; and also all such other orders, regulations and determinations as were in and by the act directed or authorized to be made; and all such other orders, regulations, and determinations as should be necessary or proper to be inserted in the said award, conformable to the tenor and purport of the act; or for the completing and maintaining the said division and inclosure. And that the said award should, within six calendar months after the execution thereof, be inrolled by the clerk of the peace of the division of *Linsey*, in the county of *Lincoln*. And that the several allotments and divisions, and all orders, directions, regulations and determinations so to be made, and declared in and by the said award, should be binding and conclusive unto and upon all the parties interested; and that immediately after the inrolment of the said award, all manner of tithes, ecclesiastical dues, duties and payments, of what nature or kind soever, arising, renewing, increasing, payable, or happening, within or out of the lands or grounds thereby directed to be inclosed, or within the said ancient inclosed lands or grounds, or otherwise howsoever, except such surplice fees and other payments as are before excepted, and all right of common, right of stray, and right of average, upon the said lands and grounds thereby directed to be inclosed, and every of them, should cease and be for ever extinguished. By the act, an appeal to the quarter sessions of the peace was given to any person who might think himself aggrieved by any thing done in pursuance of the act, the

appeal to be within six calendar months after the cause of complaint, other than and except such orders and determinations of the commissioners as in the act were declared to be final and conclusive. And the justices were required to hear and determine the matter of such appeal, which determination of the said justices should be final and conclusive to all parties concerned, and should not be removed by certiorari or any other process whatsoever into any of the courts at *Westminster*. The act contained the following saving clause:—"Saving always to the King's most excellent Majesty, his heirs and successors, and to all and every person and persons, bodies politic or corporate, his, her, or their heirs, successors, executors and administrators, other than and except the respective persons to whom any allotment of land or compensation shall be made by virtue of this act, in respect of the interest or property for which such allotment or compensation shall be made, all such estate and interest as they, every or any of them had enjoyed of, in, to, or in respect of the said fields, common pastures, carrs and waste grounds, or any of them, before the passing of this act, or could or might have had or enjoyed in case the same had not been made; but no such other person or persons, bodies politic or corporate, his, her, or their heirs, executors, administrators, or successors, shall have power to disturb any of the allotments to be made in pursuance of this act, but shall accept their respective allotments which shall be made in lieu of the lands, common rights, tithes, or other interests which he, she, or they would have been entitled to in case this act had not been made."

The commissioners appointed by the act duly proceeded to make a division and allotment of the several lands and grounds thereby directed to be divided and inclosed; and on the 29th of *November*, 1770, duly made and executed their award in writing concerning the same, which said award was duly inrolled according to the provisions of the act. By this award the commissioners assigned unto *Robert Carter* and his successors, for the time being, rectors of *Waddingham cum*

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Snitterby, as follows:—Three several plots or parcels of ground, containing together fifty-one acres, one rood, and thirty perches, statute measure, which they declared to be in lieu of and as a compensation for all the said *Robert Carter's* ancient glebe lands and rights of common in the said *North Carr*, *South Carr*, and *Carr Side* pasture, and the Ace field, in *Waddingham* aforesaid. These allotments are figured in the margin of the award, under the head of "*Waddingham* allotments. Glebe allotment." At the conclusion of the *Waddingham* allotments, on the sixteenth sheet of the award, there is a marginal note by the commissioners, "Here end the *Waddingham* allotments." Immediately after is the following marginal note, "*Snitterby* allotments begin here." In the sixteenth sheet of the award, in the margin, under the head, "*Snitterby* allotments, allotment to the rector in lieu of glebe," the commissioners assigned to the said *Robert Carter*, as rector of *Waddingham cum Snitterby*, two several plots or parcels of ground, containing together 33 acres, 3 roods, 32 perches; and which they declared to be in lieu of the glebe lands and right of common belonging to the said *Robert Carter*, as rector aforesaid; and also in lieu of an ancient inclosure or piece of glebe land given by him in exchange to *John Richardson*. The commissioners then assigned to the said *Robert Carter*, as rector of *Waddingham cum Snitterby*, five several plots or parcels of ground, containing together 223 acres, 1 rood, 31 perches, statute measure, which, quantity, quality and situation considered, they adjudged to be in lieu of and as a full recompense and compensation for all the tithes, dues, duties, and payments belonging to the said *Robert Carter*, as rector aforesaid, within the open fields, common pasture, and carrs in the townships of *Snitterby* and *Atterby* aforesaid. The commissioners also assigned unto the said *Robert Carter* and his successors, rectors of *Waddingham cum Snitterby*, one plot or parcel of ground, containing 17 acres, 2 roods, statute measure, which, quantity, quality and situation considered, they adjudged to be equal in value

to the tithes of the ancient inclosed lands in *Snitterby*. At the end of the *Snitterby* allotments is a marginal note by the commissioners as follows, "Here end *Snitterby* allotments." The commissioners then assigned unto the Reverend *George Jolland* and his successors, for the time being, rectors of *Atterby* aforesaid, a certain allotment in lieu of glebe; certain allotments, amounting together to 125 acres, 3 roods, 26 perches, statute measure, which, quantity, quality and situation considered, contained or were equal in value to two full fifteenth parts of the arable fields, common pastures and carrs in *Atterby* aforesaid; and they adjudged the same to be in lieu of and as a compensation for all the tithes, dues, duties, and payments of the said *George Jolland*, within the said arable fields, common pastures, and carr grounds in the said several townships of *Atterby* and *Snitterby*, except as in the said act is excepted; and also certain allotments in lieu of tithe of old inclosure in *Atterby* and *Snitterby* aforesaid.

The lands allotted in *Snitterby* under this act, amount to 1,533 acres, 17 perches; and deducting the allotment for the glebe, 33 acres, 3 roods, 32 perches, there remain 1,499 acres, 25 perches, two fifteenths of which would be 199 acres, 3 roods, 32 perches.

The lands allotted as aforesaid to the rector in *Snitterby*, amount to 223 acres, 1 rood, 31 perches, leaving an excess of 23 acres, 2 roods, 9 perches, above the 199 acres, 3 roods, 32 perches.

The lands allotted in the township of *Waddingham* under the act, amount to 1,281 acres, 1 rood, 36 perches, and, deducting the allotment for glebe and rector's right of common, 51 acres, 1 rood, 30 perches, and for a gravel pit, 1 acre, 2 roods, there remain of land in that township, 1,228 acres, 2 roods, 6 perches, two-fifteenths of which would be 163 acres, 3 roods, 8 perches.

The lands allotted in the township of *Atterby* under the act, amount to 846 acres, 3 roods, 28 perches, and, deducting the allotment for glebe, 13 acres, there remain of lands in that township, 833 acres, 3 roods, 28 perches, two-

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fifteenths of which would be 111 acres, 29 perches. The lands allotted to the rector amount to 125 acres, 3 roods, 26 perches, leaving an excess of 14 acres, 2 roods, 37 perches, beyond the 111 acres, 29 perches.

There are 888 acres, 16 perches, allotted to proprietors of land in *Waddingham* having no allotments made to them in *Snitterby*.

There is not in the award any order, direction, regulation, or determination of the commissioners as to the tithes of the lands in the township of *Waddingham*, inclosed by virtue of the act, or any part thereof, unless any thing above stated amounts thereto.

One of the plaintiff's witnesses, in his cross-examination, stated, that the land which the rector of *Waddingham cum Snitterby* had, was of good fair quality, and lay together convenient. He got forty acres of carr land much better than the uninclosed land which had not been mown for seven years. The defendant did not enter into any evidence at the trial, and the jury found a verdict for the defendant. If the Court should be of opinion that the verdict was wrong, then a new trial is to be awarded, otherwise the verdict is to stand.

Adams, Serj., for the plaintiff. The verdict was clearly wrong. It was the duty of the commissioners to allot to the rector, lands in each of the townships, in lieu of his tithes in each respectively. This they have not done, for the award does not set out any allotment to the rector in lieu of his tithes in the township of *Waddingham*. They have, indeed, given him an allotment of land in lieu of his tithes in the other townships, *Atterby* and *Snitterby*, but that cannot be considered as including a compensation for his tithes in *Waddingham*, because the act of parliament does not empower the commissioners to allot lands in *Atterby* or *Snitterby* in lieu of the tithes in *Waddingham*; and they cannot be presumed to have exceeded or abused their powers. The rector, therefore, is still entitled to tithes in *Waddingham*

otherwise, there will be 800 acres of land allotted to persons in *Waddingham*, who have no allotments in *Snitterby*, and yet will be to pay no tithes to the rector, although he has received no allotment in respect of their lands. The quantity of the rector's allotment in *Snitterby* shews that it was not intended as a compensation for all the tithes, for if it had been it should have consisted of 364 acres, whereas it consists in fact of only 223 acres: and the quality was proved at the trial not to be so far superior, as to render a smaller quantity of the one equal in value to a larger quantity of the other. [*Abbott*, C. J. We cannot construe the award by parol evidence.] Then, if the rector has received no allotment in lieu of his tithes in *Waddingham*, there is nothing in the act of parliament to bar his right to tithes there. It was, indeed, held by the Master of the Rolls, in a former action by the same plaintiff (*a*), that his right was barred, but that must have arisen from the fact, that the saving clause was not considered in that case. That clause saves the right of all persons, "other than and except the respective persons to whom any allotment of land or compensation shall be made, by virtue of this act, in respect of the interest or property for which such allotment or compensation shall be made;" and as the award gives the rector no allotment or compensation in respect of his estate and interest in the tithes in *Waddingham*, his right to them is saved, and he is entitled to maintain this action.

S. M. Phillips, for the defendant. It was undoubtedly the intention of the legislature that the rector should receive an allotment of land in compensation for all his tithes; but the act does not bind the commissioners to allot land in *Waddingham*, in lieu of the tithes in *Waddingham*, specifically; consequently the allotments to the rector in *Snitterby* must be taken to have been made in lieu of his tithes both there and in *Waddingham*. The act empowers the commissioners "to allot to the rector such parcels of the arable

(*a*) *Cooper* v. *Thorp*, 1 Swanston, 92.

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fields and common pastures of the townships of *Snitterby* and *Waddingham*, as shall, quantity, quality, and situation considered, be equal in value to two fifteenth parts of the titheable parts of those townships." Now, there may have been an agreement between the land-owners and occupiers of the two townships, that the rector should receive an allotment of land in *Snitterby* in lieu of his tithes in *Waddingham*, and such an arrangement would account for the excess of land allotted to him in *Snitterby*. Such an arrangement would be perfectly equitable, and would satisfy the object of the legislature; it may therefore well be presumed to have been made. After so long an acquiescence on the part of the rector, the Court will make every intendment in favour of the award; and if by any reasonable intendment the rector appears to have received a compensation in land, no matter where, in lieu of his tithes in *Waddingham*, his right is barred by the act. The main question in issue was whether he had received a compensation; that was a question of fact for the jury, and they having decided it in favour of the defendant, the Court will not disturb their verdict.

Abbott, C. J.—I think there ought to be a new trial. The case presents three questions. First, whether the commissioners were required by the act of parliament to make an allotment to the rector in lieu of his tithes in *Waddingham*. That is a question of law. Second, whether they have done so. That is a question of fact. Third, whether, assuming that they have not done so, the rector is barred by the award from now claiming his tithes in kind. That is a question of law. With respect to the first question it is admitted, and indeed the point is too plain for argument, that the act of parliament does require the commissioners to make the rector an allotment in lieu of his tithes in *Waddingham*. Then, secondly, have they done so? The award sets out several allotments to the rector, specifically and expressly in lieu of his rights in *Atterby* and *Snitterby;* but

there is nothing in any part of it to shew, that the commissioners have made him any allotment in lieu of his tithes in *Waddingham*. Then construing this award according to the general rule of law, expressio unius est exclusio alterius, we must say that they have not done so. It is useless to try the case by any numerical calculation, because that would not enable us to draw the conclusion that the commissioners intended to include in this award a compensation for the tithes in *Waddingham*. If it be asked how the commissioners were induced to make so important an omission in their award, I think a careful perusal of the case will furnish a clear answer to the question. Previous to the passing of the act of parliament, the rector had agreed to accept from the occupiers of other lands in the township of *Waddingham*, a composition of 94*l.* per annum, in lieu of tithes. In all probability the commissioners considered that agreement as binding the rector to accept that sum from his parishioners generally in lieu of all his tithes in *Waddingham*, and that by allotting him land in *Waddingham*, in lieu of his tithes in *Waddingham*, they should be paying him twice over. That composition continued to be paid and accepted during the life of the first rector; but upon his death in 1788, a new composition was made, both with respect to the lands inclosed under the decree, and those inclosed under the act of parliament. When that took place it is evident that the parishioners did not consider the tithes of *Waddingham* as included in the award, for, otherwise, they would not have consented to pay that composition, which some of them continued to do for several years, and to the present rector. This explanation appears to me strongly to fortify the conclusion that the commissioners did not intend to include in their award any compensation for the tithes of *Waddingham*. Then, thirdly, is the rector barred? I should be sorry to be driven to the conclusion that he was, for the act of parliament would then become the cause of very great injustice, because it would deprive the rector of a very important right, without allowing him any compen-

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sation in its place. But it seems to me that his right is clearly excepted by the saving clause of the act of parliament, and I cannot help thinking that if that clause had been presented to the notice of the Master of the Rolls in the former case, he would have formed a different judgment. That clause saves to all persons, other than and except the persons to whom any compensation shall be made by virtue of the act, in respect of the interest or property for which such compensation shall be made, all such estate and interest as they had in respect of the inclosed lands before they were inclosed. Now the rector was a person having an estate and interest in the lands inclosed in *Waddingham;* he has received no compensation in respect of his interest or property in the tithes in *Waddingham:* and, consequently, his right to them is not barred by the act of parliament. For these reasons, I am of opinion that the verdict is wrong, and that there ought to be a new trial.

BAYLEY, J. and HOLROYD, J. concurred.

Rule absolute for a new trial (*a*).

(*a*) *Littledale*, J. was absent.

DAVIS *v.* MORGAN.

The defendant having received a benefit, by the permission of the plaintiff, is a good consideration for a promise to support an action of indebitatus assumpsit.

THIS was an action of indebitatus assumpsit for the use, occupation and enjoyment of a certain river, stream, or watercourse, and of the water running, flowing and being therein; and of a certain wear erected, standing and being in and across the said river, &c., and of the liberty and privilege of keeping and continuing the said wear at a certain height, to wit, the height to which the same had theretofore been raised; and of certain lands and premises by defendant, at his request, and by permission of plaintiff, for a long time before then elapsed, had, held, used, occupied and enjoyed. Plea, the general issue, and issue thereon. At

the trial before *Littledale*, J. at the last *Monmouth* assizes, the facts given in evidence were in substance these. Upon, and long before, the 26th *June*, 1764, Lady *Ann Hamilton* was possessed of an ancient mill and of an ancient stream diverted out of the river *Gwilly*, in the county borough of *Carmarthen*, flowing from thence down to, and for the use of her mill, as appurtenant thereto. Defendant's grandfather, *Robert Morgan*, was at and from the same period possessed of three ancient mills, called the *Priory Mills*, in the said county borough, and of an ancient stream diverted out of the river *Gwilly*, above the stream of Lady *H.*, by means of a head wear formerly erected across the river, and flowing from thence, through the lands of several persons, and through certain lands of Lady *H.*, down to and for the use of his mills, as appurtenant thereto. Shortly before *June*, 1764, *R. Morgan* erected on other lands, below the lands of Lady *H.*, and on or near the stream in his possession, two rolling mills, a furnace, and other works, which required a larger supply of water than flowed along his stream, and in order to increase his supply of water, he widened and deepened his stream within the lands of Lady *H.*, and heightened the head wear across the river *Gwilly* about twenty-one inches higher than it was before, or ought to have been; by which means he diverted the greatest part of the water of the river *Gwilly* into his own stream, for the use of his own mills and works, so that the water of the river was prevented from flowing in its ancient stream down to the mill of Lady *H.*, so copiously as it had previously done, and thereby her mill became *of no use* for want of sufficient water to work it. For this injury, Lady *H.*, in 1762, brought an action against *R. Morgan*, and recovered 30*l.* damages. Lady *H.*, having afterwards brought a second action in the exchequer for further damages, *R. Morgan*, in order to settle that action and to terminate all disputes, agreed to take from Lady *H.* a grant and lease of the use of the stream in its widened state, and of the liberty of diverting into it from the river, as much water as he might require

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for the use of his mills and works. Accordingly, by lease of 26th *June*, 1764, reciting the facts above stated, Lady *H.*, in consideration of the sum of 1,500*l.* paid to her by *R. Morgan*, granted and demised to *R. Morgan*, his executors, &c., all the use of the said stream within her lands, in the same manner as it was then widened and deepened, and the liberty of diverting so much of the water of the river *Gwilly* into and along the said stream, as should be necessary and convenient for the use of the mills and works of *R. Morgan*; to hold from the 24th *June* then last past, for 99 years, if three persons therein named should so long live, at an annual rent of sixpence: "and Lady *H.*, for the considerations aforesaid, doth for herself and her heirs acquit, release and discharge *R. Morgan*, his executors, &c., of and from all actions, causes of action, trespasses, damages and demands whatsoever, at any time heretofore accrued or arisen for or by reason of the widening or deepening of the said watercourse, or diverting the water into and along the same, for the use of the mills and new erected works of *R. Morgan*." Shortly after the lease was executed, Lady *H.*'s mill was pulled down, and *R. Morgan* and his successors continued the use of the stream, widened and deepened as described in the lease, and of the water thereby granted, down to the end of the term. The lease expired in *November*, 1823, by the death of the then last surviving cestui que vie. The reversion in Lady *H.*'s lands became vested in plaintiff, and defendant, the grandson of *R. Morgan* the lessee, was in possession of the *Priory Mills*, and had paid rent to plaintiff, and entered into a treaty with him for a renewal of the lease. Upon this evidence, two objections were taken on the part of the defendant. First, that there was no consideration for the promise, and therefore the action could not be maintained. Admitting that the waiver of a tort would form a good consideration for a promise, still, the plaintiff had no cause of action for a tort, for as neither himself nor his predecessors had occupied the mills for sixty years, he could not prove any legal right to the

watercourse. Second, that even if the action could be maintained, at least it could not by the present plaintiff, who was a mere reversioner, but that it ought to have been brought by the occupiers of the lands. It was contended, therefore, that the plaintiff must be nonsuited. The learned judge declined to nonsuit, but reserved both points, and the plaintiff had a verdict subject to the award of an arbitrator as to the damages, and with liberty to the defendant to move to enter a nonsuit upon the points of law.

Campbell now moved accordingly, and relied entirely upon the objections taken at the trial.

ABBOTT, C. J.—It seems to me that these objections are untenable, and that the plaintiff is entitled to recover. It is clear that the defendant derived great benefit from the continuance of the wear and watercourse in the state into which they had been brought many years ago. The act of bringing them into that state was a wrong committed by the defendant's ancestor, and Lady *Hamilton*, under whom the plaintiff claims, complained of that wrong, and recovered damages in an action brought by her for that purpose. She then agreed with the defendant's ancestor, to grant him the free use of the wear and watercourse in their altered state, for a term of ninety-nine years, determinable on three lives; the consideration being a sum of 1,500*l.* paid down, and an annual rent of sixpence. After the completion of this agreement Lady *Hamilton* certainly abandoned her mill; but that may well have been done upon the consideration of the rent payable to her. The lease has expired. The defendant continues to enjoy the benefit of the wear and watercourse. Upon what terms? Clearly by the permission of the plaintiff, who is now the owner of the estate, which formerly belonged to Lady *Hamilton*. The plaintiff has incurred no prejudice; but the defendant has received a benefit: and the question is, whether the plaintiff is not entitled to have something in respect of the benefit so received by the de-

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fendant. To say that he is not, would be to make the 1,500*l.* paid to his ancestor a consideration, not only for the release of the damages at that time actually incurred, but for the use and enjoyment of the privilege for ever. Now, looking at the facts of the case, no one can believe that to have been the meaning of the parties; and, therefore, as the defendant has received a benefit, flowing to him by the permission of the plaintiff, I think that furnishes a good consideration for an implied promise on which the plaintiff is entitled to recover.

BAYLEY, J. and LITTLEDALE, J. (*a*) concurred.

Rule refused.

(*a*) *Holroyd*, J. was gone to chambers.

METCALFE and Wife *v.* BOOTE.

Saturday, April 30.

Judgment on a warrant of attorney given to a wife dum sola, cannot be entered up after her marriage without leave of the Court, though less than a year old. On application for such leave, the Court requires an affidavit proving not only the marriage, but the due execution of the warrant of attorney, by the defendant, and the non-payment of the debt.

PATTESON moved for leave to enter up judgment on a warrant of attorney, upon an affidavit stating only the marriage of the plaintiffs, that the warrant of attorney was given to the wife before marriage, and that it was not yet a year old. Upon the authority of *Marder* v. *Lee* (*a*), it was necessary to apply to the Court for leave to enter up the judgment in this case, the security having been given to the wife before her marriage, even though it was less than a year old. The only question was whether under such circumstances it was necessary to swear to the due execution of the warrant of attorney by the defendant, and to the fact that the debt was still unpaid. In ordinary cases, where the warrant of attorney was not a year old, such an affidavit would be unnecessary, and there seemed no good reason why it should be required in this.

HOLROYD, J. the only judge in court, was of opinion

(*a*) 3 Burr. 1471. See Tidd, 8 ed. 600 et seq. and the cases there collected; and 2 Archbold, Pr. 16.

that under such circumstances the plaintiffs were bound to verify, by affidavit, the due execution of the warrant of attorney by the defendant, and the fact of the debt being still unpaid. Unless those facts were proved, the Court could not know, either that the warrant of attorney was ever executed by the defendant, or that, if it was, he still remained liable upon it; and *that*, his lordship apprehended, was the reason of the rule laid down in *Marder* v. *Lee*.

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Patteson, therefore, took nothing by his motion.

The KING *v.* The COMPANY of PROPRIETORS of the Navigation from the TRENT to the MERSEY.

Saturday, April 30.

An agreement was entered into between the owners of certain lime-stone quarries and a canal company, whereby the former covenanted to deliver to the latter, yearly for ever, *as much lime-stone as they should require*, in a merchantable state, paying 7*d.* per ton, with a stipulation that if the owners neglected to supply the stone required, the company should themselves be at liberty to enter upon the quarries and work them, paying 2*d.* per ton to the owners; and the latter having made default the company entered upon and worked the quarries on the terms stipulated: Held, that they were not rateable occupiers of land within the meaning of the 43 *Eliz.* c. 2.

ON appeal against a rate by which the defendants were assessed in the sum of 100*l.* as occupiers of certain lime-stone quarries, in the parish of *Caldon*, in the county of *Stafford*, for the relief of the poor of that parish, the sessions confirmed the rate, subject to the opinion of this Court upon a case to the following effect:—

By articles of agreement, dated 10th *April*, 1776, between certain proprietors of lime-stone quarries at *Caldon*, of the one part, and the defendants of the other part, reciting that a bill was then depending in parliament to enable the defendants to continue their canal to *Caldon*, and to make a railway from thence; that there were great quantities of lime-stone in the lands of the first mentioned parties, at *Caldon*, which would be a considerable article of commerce on the proposed canal and railway, and be of great advantage to the public; and reciting that it would be of still greater public advantage, and prevent the good ends and purposes of the said bill from being defeated, if the price of the lime-stone was fixed, and made general and permanent; to which the proprietors thereof had, for the

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reasons and inducements, and on the terms after mentioned, consented and agreed, and in consideration thereof, and for the accommodation of many proprietors of coal, the defendants had agreed to petition parliament to enable them to change the course of their canal and railway, upon certain stipulations and agreements, on the part of the said coal proprietors. It was witnessed, that for carrying the said agreement into execution, and to the end that the same might be ratified by parliament, the proprietors of the said lime-stone quarries did for themselves severally, and for their several heirs, &c. covenant with the defendants, their successors and assigns, that they should and would yearly, and every year thereafter, deliver to the defendants such quantities of good and merchantable lime-stone, ready got and broke in the pits and quarries, as near the intended railway as conveniently might be, as they should require, at and after the rate of seven-pence per ton; and in case the said quarry owners, their heirs, &c. should at any time thereafter neglect or refuse to deliver such quantities as should be required, as aforesaid, then, and in such case, it should and might be lawful for the defendants, their successors and assigns, and such person and persons as they or their clerk or agent should, from time to time, nominate or appoint, to enter into and upon the lands, grounds, or stone quarries, of the said proprietors, their heirs, &c. and there to get, take, and carry away, any such quantities of lime-stone as they should think proper, out of any of the pits or quarries aforesaid, paying at and after the rate of two-pence per ton, to be computed, as aforesaid, for the same, and getting the same in a regular and proper manner. It was then further witnessed, that for the considerations aforesaid, the defendants did thereby, for themselves, their successors and assigns, covenant with the said proprietors of stone quarries, that they would, as soon as conveniently might be, after the passing of the said act, make proper and convenient railways to or near the place of the lime-stone pits in question, and keep the same at all times in proper repair, and should

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take the tonnage to be allowed by the said intended act. This agreement was afterwards confirmed, with certain additional regulations, by an act of 16 *Geo.* 3. c. 32. In pursuance of the agreement and act of parliament, the proprietors of the lime-stone quarries did for some years supply the defendants with lime-stone, at seven-pence per ton, from certain quarries of lime-stone, mentioned in the agreement and act of parliament; but having subsequently neglected to deliver the quantity of lime-stone required, according to the agreement and act of parliament, the defendants entered into a part of the land containing the said lime-stone, called the *Quarter-piece* in the act of parliament mentioned, situate in the respondent parish, which said part of the said land was at that time in the occupation of *William Wooliscroft*, the proprietor thereof, in the said agreement and act of parliament mentioned, and afterwards, and at the time of making the said rate, was in the occupation of *George Wooliscroft*, as is hereinafter mentioned, which said *G. W.*, during the time last aforesaid, was proprietor of the same jointly with one *Ralph Wooliscroft*. The said defendants have got the lime-stone out of thirteen acres of the said part of the said land, called the *Quarter-piece*, (the said part containing seventeen acres,) and still continue to get the lime-stone out of the remainder, paying the said proprietor at the rate of two-pence per ton for the same, according to the said agreement and act of parliament. The appellants do not sell, or dispose, or make any profit, of any of the said lime-stone, within the respondent parish. They merely get the lime-stone out of the quarry, from which it is conveyed along a railed road, made for the purpose by the said appellants, pursuant to the said agreements and act of parliament, to a place called *Froghall*, in the said agreements and act of parliament mentioned, situate in the parish of *Kingsley*, where it is sold to other persons, who burn it into lime. For some time previous to, and at the time of the said rate, whilst the said defendants were so getting the lime-stone from the said part of the said l

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called the *Quarter-piece*, the said *George Wooliscroft* was in the occupation of the surface of the said part, where the said defendants were not actually working, and had planted some part of the land from which the lime-stone has been so got. During such time also the said *G. W.* has been rated to the relief of the poor of the respondent parish, in respect of the said part of the said land, called the *Quarter-piece*, and has paid six pounds as his rate for the same, until *January*, 1822, when the rate was reduced to two pounds, and a rate of four pounds imposed upon the said defendants, in respect of their assessment for the lime-stone quarries so worked by them, under and by virtue of the said agreement and act of parliament. The question for the opinion of the Court is, whether the said defendants are liable to the said rate in respect of the said lime-stone quarries so worked by them.

This case had been set down in *Easter* Term last, and was then called on for argument, but it not appearing on the case, as then stated, whether or not the defendants had exclusively worked the quarries since the time the owners had ceased to supply them with lime-stone, or the defendants had or had not derived any profit from the quarries, the Court desired to have information on these points, upon affidavit, when the case should be again called on; if the parties could agree upon the state of facts, without sending the case down to the sessions, to be re-stated. Accordingly affidavits were now produced, from which it appeared, that for the last thirty years the company had exclusively worked the quarries, paying the owners two-pence per ton for the quantity of stone gotten, but that during that time the company had never derived any profit whatever from the lime-stone when sold and delivered to the lime burners, and those who gave orders for being supplied with stone; and that the company were at the sole expense of working the quarries, which expense was repaid upon the price of the stone when delivered to the consumers, but with no additional charge, by way of profit, upon the stone.

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By an act of the 16 *Geo.* 3. c. 32., (referred to in the case,) "to enable the company of proprietors of the navigation from the *Trent* to the *Mersey* to make a navigable canal from the said navigation, on the south side of *Hardcastle*, in the county of *Stafford*, to *Froghall*, and a railway from thence to or near *Caldon*, in the said county, and to make other railways," the agreement set out in the case was ratified and confirmed. The section confirming the agreement recited, that there were very great quantities of excellent lime-stone in the parishes of *Caldon* and *Alverton*, lying near the termination of the said intended railway, within the estates of many different persons, which stone might be conveyed by means of the said intended railway, &c. to a very great extent; and the price of lime, under the provisions and regulations of this act, would be much reduced, which *would greatly contribute to the improvement of land, and be highly beneficial to the public;* and then, after reciting and confirming the agreement set out in the case, it proceeded as follows:—"And to the intent *the public* may be supplied with lime-stone as punctually and conveniently as may be, the said company, their successors and assigns, shall and are hereby required to direct one of their clerks, whose name and place of residence they shall notify to the public, to provide a book and make entries therein, of the quantities of lime-stone which any person or persons shall order under the authority of this act, which order shall be given, and entry made, on or before the last day of *September*, for stone to be delivered in the then succeeding year, and the said company, &c. shall and are hereby required to distribute such orders amongst the said several proprietors of lime-stone, in the proportions aforesaid, as near as conveniently may be, and notify the same to them, on or before the 15th October then next following." By the next section, after providing that no order should be entered for less than 100 tons, upon which a deposit of twopence per ton, on each ton, should be left with the clerk of the company at the time of giving the order, and after

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making the regulations as to the time of delivering the stone so ordered, it was further enacted, that, "in case the quantity of stone so ordered shall not be provided and furnished, the company shall repay such deposit to the person making the same, and giving such order, his executors or administrators, *and also a further sum by way of forfeiture*, equal to that so deposited, or in default of payment thereof, the same shall and may be recovered from the said company, &c. by action of debt, &c.; and the said company shall and may, in like manner, recover the same from the proprietor or proprietors of stone who had received such deposit, and undertaken to execute such order, and made default therein, &c.; and moreover, in case of such neglect and default, as aforesaid, in the proprietor or proprietors of lime-stone, with respect to lime-stone ordered and entered in such book, &c. it shall and may be lawful *for the said company*, or *for the person or persons to whom such stone was to be delivered, to enter into the pit or quarry of such proprietor or proprietors of lime-stone, having so made default, and to employ any person or persons to get the quantity so required*, upon paying the sum of two-pence per ton only for such stone, they getting the same in a regular and proper manner."

Campbell and *Ryan*, in support of the order of sessions. The defendants are rateable to the relief of the poor of the parish of *Caldon*, as occupiers of land within the meaning of the statute 43 *Eliz.* c. 2. It is now found as a fact that, for the last thirty years, they have exclusively worked the stone quarries in question, and therefore, at the time when the rate was made, they must be considered as the exclusive occupiers. Whether it has been a beneficial occupation cannot affect the question of rateability, for let it be ever so unprofitable a concern, they are still liable to the poor rate if they have an exclusive occupation, *Rex* v. *Parrot* (*a*). It will not be disputed on the other side that a stone quarry

(*a*) 5 T. R. 593.

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is rateable to the poor; *Rex* v. *Alberbury* (*a*), *Rex* v. *Woodland* (*b*). Undoubtedly it is necessary to make out that the defendants have the exclusive occupation of the quarries, and that they derive the whole of the profits, such as they yield; *Lord Bute* v. *Grindall* (*c*). Here the defendants are in the exclusive occupation, and they are in the sole enjoyment of the immediate profits of the land, such as it yields. The advantage which the defendants enjoy under the agreement is not an easement, but a profit apprendre. They are in the pernancy of the profits of the land, such as it yields, namely, the lime-stone. They do not occupy perhaps as tenants. The agreement may not amount to a demise, but it is a license under which the defendants have entered and occupied, and were in the occupation at the time this rate was made. It amounts at all events to a license for one year, to enter and take the profits of the land, and under that license an entry has been made and an occupation enjoyed. In *Doe* v. *Wood* (*d*), it was held that such a license did not bar a right of ejectment before entry, but there it was laid down, that if after the license was granted the party had actually entered and had taken the produce of the mine, in that case he might have maintained both trespass and ejectment. This case is not distinguishable in principle from *Rowls* v. *Gell* (*e*), *Rex* v. *St. Agnes* (*f*), *Rex* v. *The Baptist Mill Company* (*g*), and *Rex* v. *St. Austell* (*h*). It is not necessary to determine whether the defendants have such an occupation as would entitle them to maintain trespass, for if they be occupiers within the meaning of the 43 *Eliz.* c. 2. that is sufficient. That was expressly ruled by Lord *Ellenborough*, C. J. and *Bayley*, J. in *Rex* v. *The Baptist Mill Company*. But it may be argued here, that the defendants could not maintain trespass. They have a right to do all that is necessary to give them the complete enjoyment of the quarry, by erecting galleries

(*a*) 1 East, 534. (*b*) 2 Id. 164. (*c*) 2 H. Bl. 265.
(*d*) 2 B. & A. 724. (*e*) Cowp. 451. (*f*) 5 T. R. 480.
(*g*) 1 M. & S. 612. (*h*) Ante, vol. i. 351.

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and all engines requisite to work the stone. In order to do so they must be in the exclusive occupation of the quarries, and if so, why may they not maintain trespass against a wrong-doer? Here there is nobody else working the quarries; and they are, to all intents and purposes, in the exclusive occupation. The proprietors of the quarry cannot be rated; for the two-pence per ton for the stone, which they derive, is a pure rent, and is not rateable; *Rex* v. *The Bishop of Rochester* (*a*), *Rex* v. *Earl Pomfret* (*b*). But the case decisive of the present is *Rex* v. *All Saints, Derby* (*c*), where a pauper, by order of a corporation made at common-hall, was allowed the liberty to take sand and gravel from the bed of a river, (of which the corporation were entitled to the soil,) with a condition that he sold the sand to the inhabitants of the town at a certain rate; for which liberty he paid to the corporation at the rate of ten pounds per annum: it was held that he thereby acquired a ettlement. That case was founded upon the principle that, ander such a license, the pauper had such an exclusive occupation as to confer a settlement.

W. E. Taunton, (with whom were *Scarlett*, *Nolan*, *Russell*, *Balguy*, and *Caldwell*,) contrà. The defendants are not in any sense the occupiers of this quarry; but even if they are, still they are only occupiers as trustees for the public, and not for any beneficial purpose of their own. First, are they occupiers at all? By the agreement set out in the case, and recited and ratified by the act of parliament, the owners of the quarry are bound to supply the company with lime-stone at the rate of 7*d.* per ton, in a good merchantable state, and in default of their continuing to supply the stone, then the company may enter and help themselves, paying the owners only 2*d.* per ton for the quantity taken. It is clear, therefore, that when the company entered and took the stone, they did not do so by virtue of any specific license from the proprietors, but by force of the particular agreement entered into between the parties, and sanc-

(*a*) 12 East, 355. (*b*) 5 M. & S. 141. (*c*) Id. 90.

tioned by the legislature. When the owners no longer chose to work the quarries, and thereby forced the company to enter and work them, the former must still be considered as in the occupation through the medium of the company, the only difference being, that the latter found the labourers and paid them their wages. Under the particular circumstances of this contract, these quarries have been ostensibly worked for the last thirty years by the owners of the soil, by the hands of the company, who have had no distinct rateable occupation. The principle to be collected from all the cases upon this subject is, that the liability to pay the rate attaches upon the person who is in the visible occupation of the land, and not upon those who may have any subordinate interest carved out of the property. If the company in this instance are to be held rateable as occupiers of the stone quarry, the principle may be carried to a most inconvenient extent. For instance, in the case of underwood, which is one of the rateable subjects mentioned in the statute of *Elizabeth*, it is a common practice throughout *England* for the owners of such property to sell it in a growing state, giving the purchaser license to come on the land, cut it down and carry it away at the price agreed upon. In such case, who would be the rateable occupier? Surely the vendor, and not the vendee. That instance applies directly to this case. Again, in the case of grass farms, it is a common practice, particularly in the neighbourhood of *London*, for the farmer to sell the growing crop to a stable-keeper or dairyman, giving the purchaser license to come upon the land, cut the grass and make it into hay at his own risk and expense. In such case who would be the occupier, the owner of the farm or the purchaser of the crop? Surely it could not be held that the purchaser of the crop was a rateable occupier within the meaning of the statute; and yet there is no distinction in principle between that case and this. Suppose also the case of a nurseryman, who contracts to supply a certain number of plants growing in his garden, and allows the purchaser the privilege of coming

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on the land to take them as he has occasion for them, paying a certain reduced price in consideration of taking upon himself the labour and expense of carriage, who in that case would be the rateable occupier? Surely it would be absurd to argue that the purchaser of the plants was a rateable occupier. That case comes nearer the point in question than either of the other instances. But in many parts of *England* where there are stone quarries, the owner, instead of taking upon himself the trouble and risk of working, contracts with the mason to come and get the stone, paying him so much per ton or square yard as the case may be; but it was never yet considered that the purchaser in such case was to be deemed the occupier. The owner of the stone, who makes the contract, is in every sense the rateable occupier. The cases cited on the other side are wholly inapplicable to this, because in them the person rated was liable personally as the beneficial owner of the estate in respect of which he was rated. But here the company have only a subordinate interest carved out of the land, and stand merely in relation of purchasers of a portion of the produce. The authority of the case of *Rex* v. *All Saints, Derby*, is not disputed, but it does not at all touch the present case. The occupation of an estate which would gain a man a settlement would not necessarily render him a rateable occupier. Would a cow tenement make a man a rateable inhabitant? Surely not. It is not denied as a fact that the company have exclusively worked these quarries for the last thirty years, but that is merely an accidental circumstance, and does not make them occupiers within the sense and meaning of the statute of *Elizabeth*. But assuming them to be occupiers in any sense whatever, then the question is, secondly, whether they are beneficial occupiers, or occupiers only as trustees for the public. Now attending to the language of the act of parliament ratifying the agreement in question, it is manifest that they are neither the exclusive occupiers, nor have they a beneficial occupation which will make them liable to be rated. The primary object of the

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legislature in passing this act, was to secure to the *public* a supply of lime-stone at the cheapest possible rate for agricultural and other purposes, and having that object in view, the statute imposes upon the company the obligation of executing such orders as may be entered by the public in their books, and in case of default, they shall not only return the deposits which have been paid at the time the orders were given, but they are rendered liable to a penalty by way of forfeiture, equal to the money deposited, for such default. There is therefore a duty and obligation cast upon the company, which they must not neglect but at the peril of a penalty. Is this then consistent with the nature of an occupation for the company's own beneficial purposes? Surely not. But the act does not stop there, for it is expressly declared that in case of default, either on the part of the company or of the quarry owners, " it shall and may be lawful, for the person or persons to whom such stone was to be delivered, to enter into the pit or quarry of such proprietor or proprietors of lime-stone having so made default, and to employ any person or persons to get the quantity so required, upon paying the sum of 2*d.* per ton only for such stone, they getting the same in a regular and proper manner." It is manifest therefore from these two provisions, first, that the company have not the exclusive occupation, because any other person would be entitled to come and get lime-stone in case of default, either on the part of the company or of the stone proprietors, and second, that the company are merely *trustees* for the public, and not beneficial occupiers, upon whom the liability to pay rate attaches. On these grounds the order of sessions must be quashed.

Abbott, C. J.—This case comes before the Court under circumstances so very peculiar that it is not very likely any prior decisions should be found to cast much light upon it, or serve as a guide for our judgment on the subject; nor is it likely that our decision may serve as a precedent for any

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case that may occur hereafter. The question arises upon a contract of a very special nature, made between the owners of certain lime quarries and the *Trent* and *Mersey* Canal Company. The question is, whether, due regard being had to the terms of that contract, the company can or cannot be considered as the occupiers of the lime quarries for which they have been rated. Now, looking at the contract, it appears that the company, before it was executed, had made an application to parliament to enable them to make certain rail-roads. At that time it was thought convenient and beneficial to the public, that quantities of lime-stone in the neighbourhood of *Caldon* should be secured at a specific price as far as regarded the owners of the quarries, and in consideration of their consent to supply stone at that price, the company undertook to apply to parliament for some alteration in the bill then depending. The contract recites that the supply of lime-stone would be a considerable article of commerce, and of great advantage to the public, and further, that it would still be of greater public advantage, if the price of the lime-stone was fixed and made permanent and general; and to effect this object, the owners of the quarries bind themselves to raise and deliver to the company yearly such quantities of lime-stone as they may think fit to require, at 7*d.* per ton. But the owners of the quarries, wisely anticipating the probability that, by the advance of the prices of labour, 7*d.* per ton would turn out to be a very inadequate payment to them for the lime-stone, and fearing that they might ultimately become losers by the concern, caused to be inserted in their contract a clause to this effect, namely, that they shall be at liberty, if they think fit, to decline raising and delivering stone to the company at 7*d.* per ton, but still, in order that the public may not suffer, the company may enter upon the quarries, and raise as much as they shall think fit, paying 2*d.* per ton for the same. In order to see whether this contract gives to the company the exclusive occupation of the quarry, (the fact having happened that the owners had declined getting the stone them-

selves,) it is important to consider how the case would stand with reference to the power which the company have of getting as much stone as they shall think fit. Suppose they think fit to get but a very small quantity; is there any thing to prevent the owners of the quarry from allowing other persons to get stone, or must it remain there unprofitable? I find nothing in the contract which is to prevent the owners of the quarry from doing that. If indeed the owners of the quarry were to allow other persons to get stone in such quantities as that the quarry would not yield to the company as much as they might want, they would be liable to an action, at the suit of the company, for a breach of their contract, in not providing them with as much stone as they wanted, but that is all. It appears to me that, if a similar license was granted by the owners of the quarry to other persons, the company could not bring an action of trespass against those persons for entering upon the quarry, and taking stone under such a license. In my opinion it would not be competent for them to say to those persons—"This quarry and all the stone it contains belongs to us; we are in the exclusive occupation of it, and you are trespassers on our rights." That is the opinion I have formed upon the effect of this contract, and thinking so, I cannot say that the company have the sole and exclusive perception or occupation of the quarry so as to render them rateable to the poor. All that they have, is merely the privilege of getting as much stone as they shall require at a fixed price, still leaving it open to the owners of the quarry to allow the surplus, if any there shall be, to be taken by any other persons they may think proper. For these reasons it appears to me that the company are not properly to be considered as occupiers of the quarry, and therefore as a rate cannot be made upon them, the order of sessions must be quashed.

Bayley, J.—In order to make the company rateable, they must be liable under the 43 *Eliz.* c. 2., as "*occupiers of land;*" and then it becomes necessary to see whether

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they are or are not clothed with that character. Upon adverting to the cases upon this subject, it will be found that this distinction prevails through them all, namely, that if the owner of mines has *demised* his mines, and he himself ceases, in every respect, to be the occupier of the land, he is not liable to be rated; but if he grants a privilege or liberty to others to work them, (not in the character of lessees,) then they have an *easement* only, and are not, in that respect, to be considered as the occupiers of the land, and the rate attaches upon him alone. That distinction will be found to reconcile almost all the cases upon this subject. In *Rex* v. *The Bishop of Rochester* (a) the proprietor of the land *demised* the mines by lease, and he was held not liable to be rated. So in *Rex* v. *Earl Pomfret* (b), the mines being *demised*, the proprietor was held not liable. In *Rex* v. *The Baptist Mill Company* (c), the owner had *demised* the mines to the defendants, and they were held liable. I believe in all the other cases the mines had been worked by persons who had the *liberty* and *privilege* of *working* only. This was so in *Rowls* v. *Gell*, *Rex* v. *St. Agnes*, and *Rex* v. *St. Austell*, in all of which the distinction I have pointed out was taken. In *Rex* v. *Earl Pomfret*, in which the Court took time to consider of its judgment, which was delivered elaborately by Lord *Ellenborough*, the test laid down in determining the question of rateability between the owner of the soil and the adventurers, was this; "Does the relation of landlord and tenant subsist between the parties?" If that be the true criterion, which I think it is, then I ask, is the relation of landlord and tenant created between these parties? Looking at the contract in question itself, it seems quite clear to me that it does not exist. I do not rely upon that part which gives the proprietors of the quarry the option of getting the stone themselves or not, because I consider the whole document as merely giving the company a liberty or privilege of getting from time to time as much as they should think fit, paying 2*d*. per ton. That would only give

(a) 12 East, 355. (b) [illegible] M. & S. 139. (c) 1 M. & S. 612.

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them the privilege of getting as much as they should want for any length of time, but it would not vest in them the possession and property of the quarry. If this were not merely a license, but constituted the relation of landlord and tenant between the parties, the owners could not grant leave to a stranger to take stone, for then the quarry would belong to the company, and they might maintain trespass against a wrong-doer. But the legal operation of this instrument being merely to grant a license, the owners might allow other persons to take stone, subject, however, to any breach of covenant whereby the company might be damnified by the diminution of the quantity of stone to which they would be entitled. This is only a personal liberty, and certainly does not constitute the relation of landlord and tenant. It appears to me, therefore, that the company are not occupiers of land within the meaning of the statute of *Elizabeth*, and consequently are not rateable to the poor in respect of these quarries.

Holroyd, J. concurred, and mentioned *Cheatham* v. *Williams* (*a*) as an authority in point to shew, first, that the instrument in question was only a license; and second, that the company could not be considered as having the exclusive occupation under its terms.

Order of sessions quashed (*b*).

(*a*) 4 East, 46. (*b*) *Littledale*, J. was absent.

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"The next sessions," in the 17 *G.* 2. c. 38. s. 4. means the next practicable sessions.

Therefore, where appellant had notice of the allowance of overseers' accounts on the first day of the *April* sessions, entered and respited his appeal on the first day of the *July* sessions, and tried it at the *October* sessions:—*Held*, that the proceedings were regular.

Appeal against the allowance of overseers' accounts. The appellant received notice of the allowance of the accounts on the first day of the *April* sessions, entered and respited his appeal on the first day of the *July* sessions, and

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eventually tried it at the *October* sessions, when the order of allowance was quashed. An objection was then taken on the part of the respondents, but over-ruled, that the appellant was too late, for as the 17 *Geo.* 2. c. 38. s. 4. directed that every appeal against the allowance of overseers' accounts must be at the *next* sessions after such allowance, this appeal should, at the latest, have been entered at the *April*, and tried at the *July* sessions. The sessions having entertained the appeal, the question for the opinion of this Court is, whether they were regular in so doing.

Maule, in support of the order of sessions. The sessions were perfectly regular in hearing this appeal at the *October* sessions. It was impossible for the appellant to lodge his appeal in *April*, so that it might be heard in *July*, because the accounts were only allowed and published on the first day of the *April* sessions, and some interval was absolutely necessary, in order carefully to inspect the accounts, and to consider whether there was ground of appeal against them, or not. [Here the Court stopped him.]

Campbell, contrà. The appeal ought not to have been heard at the *October* sessions, for it was then clearly out of time. It was decided in *Rex* v. *The Justices of Worcestershire* (*a*), that an appeal against overseers' accounts must be to the next general quarter-sessions after the allowance of the accounts; and that the 17 *Geo.* 2. c. 38. s. 4. is, in this respect, a repeal of the 43 *Eliz.* c. 2. s. 6. Lord *Ellenborough*, in delivering his judgment there, said, "the plain meaning of the 17 *Geo.* 2., in enacting, 'that it shall be lawful to appeal to the *next* sessions,' where, by a pre-existing act, the appeal was without limitation of time, is to negative the power of appealing to any but the *next*. In *Rex* v. *Coode* (*b*), Lord *Mansfield* was of opinion that the 17 *Geo.* 2. did confine the appeal, and the Court agreed that they must decide that the statute had repealed the 43 *Eliz.* in this particular. I feel no inclination to disturb that de-

(*a*) 5 M. and S. 457. (*b*) Cald. 464. 1 Bott, 281. S. C.

cision, considering how much the public convenience is in its favour. I know not to what difficulties persons whose property is liable, and those who are bound to account, might be reduced, if we were to adopt a different construction. With respect to the objection that the time may be too short to prepare for the appeal, if upon any occasion this should be made appear, the appeal may be lodged, and adjourned on a proper application." Now that is decisive of the present case.

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Abbott, C. J.—This party could not possibly appeal before he had notice of the allowance of the accounts, and that notice he got only on the very day when the *April* sessions began. Clearly, therefore, he was not bound to appeal at those sessions. Then the *July* sessions were the *next* sessions within the very letter of the act of parliament, and then the appeal was lodged. But upon the authority of the very case cited, as well as upon the concurrent authority of all the cases on this subject, the justices had a discretionary power at those sessions, either to adjourn the appeal as their own act, or to permit the appellant to respite it to the *October* sessions, and having done so, to hear it then. Nothing appearing to the contrary, we must presume that one of those two courses was adopted, and then the whole proceeding has been perfectly regular, perfectly consistent with the case cited, and perfectly in obedience to the act of parliament. The order of sessions, therefore, must be confirmed.

Bayley, J. concurred, and mentioned *Rex* v. *The Justices of Gloucestershire* (*a*), and *Rex* v. *The Justices of Dorsetshire* (*b*), as cases in point.

Holroyd, J. and Littledale, J. concurred.

Order of sessions confirmed (*c*).

(*a*) Doug. 191. 2 Bott, 727. S. C. (*b*) 15 East, 200.

(*c*) See *Rex* v. *The Inhabitants of Hendon*, ante, vol. ii. 249, where the Court, upon the authority of *Rex* v. *The Justices of Sussex*, 15 East, 206.

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Saturday, April 30.

The King v. The Inhabitants of Ilkestone.

Where an apprentice to an inhabitant of the parish of I., regularly and with the consent of his master, went into the parish of R. on Saturday night, and there remained till Monday morning, when he returned to I. having done no work for his master while absent; and at the end of 4 years left his master with leave for a holiday, slept one night at R. and then absconded:—Held, that such residence in the parish of R. was not an inhabitation within the 3 W. & M. c. 11. s. 8. and conferred no settlement.

By an order of two justices *Ann Whinyates* was removed from the parish of *Radford* in the county of *Nottingham*, to the parish of *Ilkestone* in the county of *Derby*: and the sessions on appeal confirmed the order, subject to the opinion of the Court upon the following case:

John Whinyates, the pauper's husband, was bound apprentice by indenture dated 22d *December*, 1818, for the term of 7 years, to *Benjamin Roberts*, a boat-builder, an inhabitant of *Ilkestone*. Afterwards he lodged and worked with his master in *Ilkestone*, but regularly, and with the knowledge and consent of his master, went to his father's at *Radford* on the *Saturday* night; slept there on the *Saturday* and *Sunday* nights, and returned to his master on the *Monday* morning. On the *Saturday* before the *Nottingham* fair in the month of *October*, 1822, the pauper's husband went to his father's, as usual, slept there on the *Saturday* and *Sunday* night, and returned to his master on the *Monday*, and worked for him that day; and in the evening asked and obtained his master's permission to go home again for the purpose of being at the fair at *Nottingham* on the two following days. He left his master's that evening accordingly, and never returned, having enlisted for a soldier a few days afterwards. The pauper's husband did no work for his master on *Saturday* nights or *Sundays*, or at any other time while he was at his father's. The inden-

206. said, that "the next sessions meant the next practicable sessions at which an effectual appeal could be lodged after the allowance and publication of the *rate*." Now it has been decided, in appeals against poor rates, that the appeal must be to the next sessions; *Rex* v. *Atkins*, 4 T. R. 12. 1 Bott, 287. S. C. *Rex* v. *The Justices of London*, 15 East, 632; it would, therefore, seem extraordinary, that as it has been held necessary, both in cases of poor rates and overseers' accounts, to appeal to the next sessions, it should not also be held in both cases that the next, means, the next practicable sessions.

ture was retained by the master till applied for some days after the pauper's husband had enlisted, when he gave it up. The question for the opinion of this Court is, whether the pauper's husband acquired a settlement in *Radford*, or in *Ilkestone*.

Marryat, in support of the order of sessions. The pauper was apprenticed to a person residing in *Ilkestone*, and though he constantly left that parish on the *Saturday* evening and went to *Radford*, where he remained till the *Monday* morning, when he returned to *Ilkestone*; and, although he slept the last night of the term of his service under the apprenticeship in *Radford*; still, as his occasional residence there had no connection with, and was not for the purposes of his service, he gained no settlement there, and is properly settled in *Ilkestone*. It has been repeatedly decided that no casual residence, if unconnected with the duties and purposes of the service, will confer a settlement: *Rex* v. *Barmby in the Marsh* (*a*), *Rex* v. *Ribchester* (*b*), *Rex* v. *St. Mary Bradin* (*c*), and *Rex* v. *Brotton* (*d*).

Balguy and *N. R. Clarke*, contrà. This case is distinguishable in its facts and circumstances from all those cited on the other side. The general rule of law is, that an apprentice is settled in the parish in which he sleeps. [*Bayley*, J. No doubt, if his sleeping there be connected with, and for the purposes of his service, but not otherwise.] It was so here; the case finds that whenever the pauper slept in *Radford*, it was with the knowledge and consent of his master, so long as his apprenticeship lasted; and the last night of the term he also slept in that parish, and that is the criterion in cases of this kind, and shews him to be settled there. The words of the statute 3 W. & M. c. 11. s. 8. are strongly confirmatory of this argument. "If any person shall be bound an apprentice by indenture, and inhabit

(*a*) 7 East, 383. (*b*) 2 M. & S. 482.
(*c*) 2 B. & A. 382. (*d*) 4 B. & A. 84.

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in any town or parish, such binding and inhabitation shall be adjudged a good settlement." The inhabitation may be in any parish, it is not confined to that in which the master lives: and a person can only be properly said to *inhabit* in the place where he sleeps. *Rex* v. *Stratford on Avon* (*a*) seems also an authority in point, for it was there held that where an apprentice goes into and sleeps in another parish on account of illness, but while there, is occasionally employed by his master, though not in his trade, a settlement is gained by forty days' residence in that parish. In this case there was no suspension of the apprenticeship, as there was held to be in *Rex* v. *Ribchester:* the master never lost his legal control over the apprentice, and he might at any time have withdrawn his consent to his sleeping at *Radford*, or have compelled him to return to *Ilkestone* at a moment's warning. [*Bayley*, J. Is not *Rex* v. *St. Olaves Jury* (*b*) strongly against you? There the apprentice was bound to a cobbler, who kept a stall in one parish, slept in another, and the apprentice slept in a third; and the Court held that no settlement was gained in either.] That case has been overruled by *Rex* v. *Castleton* (*c*), and several other similar cases. Indeed the authority of that case was always doubted. Dr. *Burn*, in citing it says (*d*), "This case seems to stand alone, and by the analogy of the other cases, both with respect to apprentices and servants, it seems that the cobbler's apprentice gained a settlement in the parish where he lodged. A man may be occupied in several parishes in the day-time, but his home and habitation seems to be where he draws to at night." The analogy between the two sets of cases and the statutes out of which they spring, is certainly strong, and supports the present argument.

Abbott, C. J.—I am of opinion that the husband of this pauper acquired no settlement in the parish of *Radford*, but that he did acquire a valid settlement in the parish of

(*a*) 11 East, 176. (*b*) 1 Stra. 51.
(*c*) Burr. S. C. 569. (*d*) Burn's Justice, Vol. IV. 491. 24th Ed.

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Ilkestone, where the person to whom he was apprenticed lived, and where he himself slept five nights out of every seven. I take the true construction of the eighth section of the statute to be, that the inhabitation must be one connected with and in furtherance of the apprenticeship and the service under it, and therefore it seems to me that an occasional and temporary absence from the master's parish and residence in another parish, granted as an indulgence, and unconnected with the contract, is not an *inhabitation* in that other parish, within the meaning of the act of parliament. Then what are the facts here? On the five nights in the week succeeding the principal days of labour, the apprentice slept in the master's parish, *Ilkestone*; on the two remaining nights in the week he slept in his father's parish, *Radford*. Undoubtedly, such a sleeping, or residence, as the latter, *may* in some cases be connected with and in furtherance of the apprenticeship and the service, and then it would be an inhabitation within the meaning of the statute; but this had no reference to the apprenticeship or the service, but was perfectly independent of it. I am, therefore, of opinion, that this pauper is properly settled at *Ilkestone*, and that the order of sessions should be confirmed.

Bayley, J.—Where a master does not provide for his apprentice any place for sleeping, or does provide one out of the parish which he himself inhabits, I admit that, with the other necessary ingredients, residence in any such other parish would be an inhabitation within the meaning of the legislature, and would confer a settlement. I will further admit that, where a master provides for his apprentice a place for sleeping in his own parish, and the apprentice from illness, and as a matter of necessity, sleeps elsewhere, but still continues in his service, coming daily from the parish where he so sleeps, to his work in his master's parish; there the sleeping is connected with the service, and is also a good inhabitation. *Rex* v. *Stratford-on-Avon* was a case of that kind, and the Court there held that the apprentice was

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sleeping in the other parish in his character of apprentice, and as part of his service, and therefore held that he acquired a settlement there. This is a perfectly distinct case from that. Here the apprentice performed no kind of service for his master from the Saturday evening to the Monday morning; he was absent from his master's house during that interval as an indulgence; his master had no authority or control over him while he was so absent: in short, there was every week a suspension of the apprenticeship and of the service. Then *Rex* v. *Ribchester* is directly in point with this case; the only difference being, that there the master was ignorant of the absence of the apprentice, and here the absence was with the master's knowledge and consent, which in my opinion makes this even a stronger case than that. For these reasons, I concur in the opinion that the pauper's husband acquired a settlement in *Ilkestone*, and not in *Radford*, and therefore that she is legally settled in the former parish.

Holroyd, J. concurred.

Orders confirmed (*a*).

(*a*) *Littledale*, J. was absent.

Tuesday, May 3.

Hick v. Keats, in Error (*a*).

An annuity granted by a son to his mother, in consideration that she had sold her business, and had advanced the proceeds, with other money, to him, to set him up in business, it not appearing that the annuity was stipulated for at the time the money was advanced, is not an annuity granted for a pecuniary consideration, within the 17 *G.* 3. c. 26.

Where issues are taken on several pleas, and a verdict found on one only, which is held bad, the Court will award a venire de novo.

WRIT of Error from the Common Pleas. The declaration was in debt on a joint and several bond, executed by the plaintiff in error and one *T. M. Keats*, conditioned to pay to the defendant in error an annuity of 40*l.* a year for her

(*a*) See 5 J. B. Moore, 629.

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life. The pleas were, first, non est factum. Second, that before the making of the bond, to wit, on &c. at &c. plaintiff, having long carried on business as a wine and spirit merchant, was induced, at the request of her sons, *T. M. Keats* and *J. Keats*, to sell her said business, and did then and there sell the same, and the money arising therefrom, with what other money she possessed, amounting together to 1,000*l.* plaintiff then and there advanced to her said sons, to set them up in business; that in consideration thereof, it was afterwards agreed between plaintiff and her said sons, that each of them should give her a bond securing her an annuity of 40*l.* a year, and should procure some person or persons to join them therein as a further security for the due payment of the two annuities; that in pursuance of that agreement the said *T. M. Keats*, and defendant as security for the said *T. M. Keats*, afterwards, to wit, on &c. at &c. made and sealed, and as their act and deed delivered to plaintiff the said writing obligatory in the said declaration mentioned, and plaintiff then and there accepted and received the same, with the condition thereunder written, of and from the said *T. M. Keats* and defendant, in pursuance of the said agreement, and for the consideration aforesaid; and that no memorial of the said writing obligatory in the said declaration mentioned was inrolled in the high court of chancery within twenty days of the execution thereof, according to the directions of a certain act of parliament made &c. in the 17th year of his late Majesty George III. whereby the said writing obligatory in the said declaration mentioned is null and void. The replication traversed the delivery of the bond, and denied that plaintiff accepted the same in pursuance of the agreement, and for the consideration in the said second plea mentioned, modo et formâ. The jury found that defendant did deliver the bond, and that plaintiff did accept the same, in pursuance of the agreement, and for the consideration in the second plea mentioned, modo et formâ. There were several other pleas, and issues joined on them, but with respect to them no verdict was found:

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upon the issue found, the Court below gave judgment for the plaintiff.

Campbell, for the plaintiff in error. This annuity is void for want of inrolment. The Court of Common Pleas (*a*) considered the annuity as given for natural love and affection; but that is not so. The consideration must be taken to be that which is set out by the plea, and has been found by the jury, namely, the debt owing to the defendant in error from her sons. That was money advanced, and therefore constituted a debt; the only question is, whether an antecedent debt is a pecuniary consideration within the meaning of the annuity act, 17 *G.* 3. c. 26. The title of the act, and the first section, seem so framed as to comprise *all* annuities, but the eighth section certainly makes several exceptions, the only one of which, however, that can possibly apply to the present case, is that of annuities granted without regard to pecuniary consideration. But even that does not apply, because here there was a loan to the grantor, and a debt to the grantee. [*Abbott*, C. J. How does it appear that there was any pre-existing debt to Mrs. *Keats*? There is no evidence to shew whether she advanced the money as a loan or a gift. *Bayley*, J. And a mere advance of money by a parent to a child, without such evidence, must be considered as a gift, and not a loan. Independently of the eighth section, voluntary annuities have been held to be out of the operation of the act.] There are, certainly, several cases to that effect; as, *Crespigny* v. *Wittenoom* (*b*), *Hutton* v. *Lewis* (*c*), and *Horn* v. *Horn* (*d*): but in all these cases the plea was silent as to any pecuniary consideration, whereas, here a pecuniary consideration appears by the plea, and has been found by the jury. So, *Doe* v. *Phillips* (*e*) is distinguishable from the present case, for there no money ever passed between the grantor and the grantee. *Crossby* v. *Arkwright* (*f*) is the case most nearly resem-

(*a*) 5 J. B. Moore, 629. (*b*) 4 T. R. 790. (*c*) 5 T. R. 639.
(*d*) 7 East, 529. (*e*) 1 Taunt. 356. (*f*) 2 T. R. 603.

bling the present in its circumstances, and there this Court held the annuity to be void for want of inrolment. 1825. HICK v. KEATS.

Tindal, contrà, was stopped by the Court.

ABBOTT, C. J.—There must be a venire de novo awarded in this case, because there are pleas upon the record, good in form, and upon which no verdict was found at the former trial. But, with respect to the second plea, upon which the judgment of the Court of Common Pleas proceeded, I am of opinion that it is bad, and that it does not bring the case within the 17 *G.* 3. c. 26. which was the statute regulating annuities at the time when this transaction occurred. The object of that statute, apparent in the title, and pervading every clause of it, was, to prevent the imprudent sale of annuities. Can we, with reference to the facts disclosed by this second plea, say that there was any sale of the annuity in this case, or that the annuity was granted for a pecuniary consideration, in any fair sense of that phrase? I think we cannot. The plea states, first, that Mrs. *Keats* was induced, at the request of her sons, to sell her business, and that she did sell the same, and the money arising therefrom did then and there advance to her said sons, to set them up in business. It then states that in consideration thereof it was afterwards agreed that each of her sons should give her a bond, with a surety, for the payment of an annuity of 40*l.* a year; and lastly, it avers that the bond in question was given in pursuance of the said agreement, and for the consideration aforesaid. The issue is upon the replication, which negatives the plea in terms, and the jury have found that the bond was given in pursuance of the said agreement, and for the consideration aforesaid, that is, in consideration that Mrs. *Keats* had at some prior time advanced money to her sons; but they have not found that there was a stipulation for the grant of the annuity, at the time when the money was so advanced. It seems to me, therefore, clearly, that this plea does not bring the case within the statute, and is

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no bar to the action; but for the reason already mentioned there must be a venire de novo.

The other judges concurred.

Venire de novo awarded.

Tuesday, May 3.

Covenant, by one of five tenants in common, on a lease for rent payable on the four most usual days of payment in the year. Breach, that on the 24th *June*, a large sum of money, to wit, the sum of 21*l.* 15*s.*, one fifth part of the rent, for three quarters of a year *then* elapsed, became due, and was in arrear from defendant to plaintiff:—Held, on special demurrer, that this was good.

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DECLARATION in covenant stated, that before the making of the indenture thereinafter mentioned, Lord *Henniker* was seised in his demesne as of fee of and in the tenements thereinafter mentioned to have been demised, and, being so seised, afterwards, to wit, on 29th *September*, 1814, by indenture demised the said tenements to defendant, to have and to hold for fourteen years from the date thereof, at the yearly rent of 145*l.*, payable quarterly, on the four most usual feasts or days of payment in the year; the first payment to be made on *Christmas* day then next ensuing. That defendant covenanted to pay the rent at the times therein before mentioned. That defendant entered upon the premises. That plaintiff, on 12th *November*, 1819, became seised in his demesne as of fee of the reversion of one undivided fifth part or share of the said demised premises, with the appurtenances, as one of five tenants in common, and that after the making of the indenture, and after plaintiff became so seised, and before the expiration of the term, to wit, on the 24th *June*, 1824, a large sum of money, *to wit, the sum of* 21*l.* 15*s.*, *one fifth part of the said rent of* 145*l.*, *for three quarters of a year of the said term then elapsed*, became due from defendant to plaintiff, according to the form and effect of the said indenture and of the said covenant, and by reason of the premises, and still is in arrear and unpaid, contrary to the said covenant, &c. Demurrer to the declaration, assigning for cause, first, that it was alleged in the breach that a certain specific sum, to wit, the

sum of 21*l*. 15*s*., was due to plaintiff for his share of the rent, whereas it should have been alleged that an undivided fifth part of the three quarters rent was due to him; and second, that it was alleged that the rent was due for three quarters of a year of the term *then* elapsed, whereas it should have been alleged with certainty for which three quarters of a year, specifically, the rent was due. Joinder in demurrer.

Chitty, in support of the demurrer. It must be admitted, as now settled law, that the assignee of the reversion of a part of the demised premises may maintain an action of covenant: *Twynam* v. *Pickard* (*a*). He cannot, however, declare for any specific sum. It was laid down by Lord *Holt*, that if tenants in common sever in an action of debt, they must each declare de unâ medietate of the whole rent, and not for a certain sum which amounts to a moiety; *Midgley* v. *Lovelace* (*b*); and the same rule is given in *Bacon's* Abridgment (*c*). The plaintiff cannot, as here, apportion the rent for himself; the apportionment of the rent is the province of the jury: *Bliss* v. *Collins* (*d*). [*Abbott*, C.J. That was not the case of a tenant in common. Suppose the plaintiff here had alleged that one fifth part of the whole rent, amounting to a certain sum, to wit, the sum of 21*l*. 15*s*., had become due, would not that have been good?] That may be a matter of doubt, but it is enough to say that he has not so alleged here. Secondly, it does not appear with sufficient certainty in respect of what period the rent became due. It is laid down in *Gilbert* on Debt (*e*), that in declarations for rent the plaintiff must set forth at what day or feast the rent became due, for the declaration will, upon demurrer, be held too general, if it only alleges that so much rent is due. The demand here for rent due on the 24th of *June*, for three quarters then elapsed, is clearly

(*a*) 2 B. & A. 105. (*b*) Carth. 289.
(*c*) Tit. Joint tenant and tenant in common (K).
(*d*) Ante, vol. i. 291. (*e*) 407.

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insufficient; for the rent does not become due until the last moment of the day; and therefore the allegation that the rent was due on that day for three quarters *then* elapsed, is not only vague and uncertain, but absolutely untrue.

Halcomb, contrà, was stopped by the Court.

ABBOTT, C. J.—The pleader in this case has certainly departed from the common course of precedents, which it is always unwise to do; but, nevertheless, I think the declaration is sufficient. The form of action here is covenant, which, even in ancient times, was always treated with more liberality than actions of debt; therefore the rules of pleading, cited by Mr. *Chitty*, do not apply to it; they are confined to actions of debt. The first objection arises from a mere transposition of words; but the sense is precisely the same; for I can see no difference between the declaring "that a fifth part of the rent, being 21*l.* 15*s.*, became due," and "that 21*l.* 15*s.*, being a fifth part of the rent, became due:" the only possible method of ascertaining the amount actually due, being, by dividing the whole rent by five. The second objection rests entirely upon the use of the phrase "then elapsed." If the word *then* had been omitted, it is conceded that this objection would not have arisen, but it is said that the three quarters, ending on the 24th of *June*, were not elapsed until the last moment of that day. We must, however, give such a construction to these words as will fairly render them consistent with the previous parts of the sentence; and as it is alleged that on the 24th of *June* rent became due for three quarters of a year, we may, I think, notwithstanding the words "then elapsed," take that to be rent due for three quarters immediately preceding the 24th of *June*.

The other judges concurred.

Judgment for the plaintiff.

FORMAN and FOTHERGILL *v.* DREW.

ASSUMPSIT on two promissory notes, the first for 65*l.* 5*s.*, made by one *Norris*, payable to the defendant, and by the latter indorsed to the plaintiffs; and the second for 16*l.* 17*s.* 6*d.*, made by the defendant, payable to *Thomas Webb*, and by the latter indorsed to the plaintiffs. The defendant pleaded his discharge under the Insolvent Debtors' Act, 1 *Geo.* 4. c. 119, on the 1st *March*, 1822. Replication took issue on the discharge. At the trial before *Littledale*, J. at the last assizes for the county of *Monmouth*, the only question was, whether the discharge under the Insolvent Debtors' Act, given in evidence by the defendant, was a sufficient discharge to bar the plaintiffs' cause of action. The facts proved in evidence were these:—The notes in question had been given by the defendant in payment of a balance due to the plaintiffs for several quantities of coals, sold, on their account, to him. The plaintiffs were owners of certain collieries in *Monmouthshire*, and carried on business under the name of the "*Argood* Coal Company," and employed *Thomas Webb*, the payee of one of the notes, as their agent at *Newport*, to superintend their business at that place. Five cargoes of coals, the property of the plaintiffs, were delivered to the defendant between the months of *February* and *June*, 1821. With each of those a regular invoice was sent, made out in the name of the *Argood* Coal Company. When the second cargo was sent, it was accompanied with a letter from *Webb*, addressed to the defendant, in the following words: "*Newport*, 10th *March*, 1821. Sir, I should have answered your letter before, but Mr. *Fothergill* was from home, *and he owns great part of the concern*. Eleven shillings a ton is the lowest, &c." In a conversation which afterwards took place between *Webb* and the defendant, in which the latter was requesting the former to take a bill, *Webb* said he could not, for if he did

The Insolvent Debtors' Act, 1 *G.* 4. c. 119. is to receive a liberal construction in favor of the prisoner, and a discharge under the same is a bar to the claims of creditors, provided, under s. 6, the insolvent describes in his schedule those persons to whom, according to the best of his knowledge or belief, he is primarily liable. Therefore, where an insolvent contracted for goods with *A.*, who was only the agent for a company, and after giving two promissory notes for the debt, amounting to 82*l.* 2*s.* 6*d.*, became insolvent, and took the benefit of the act, without describing the company as his creditors, and stating the debt to be only 82*l.*:— *Held*, that his discharge was an answer to an action at the suit of the latter upon the promissory notes.

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so his *employers* would blame him. The employment of *Webb*, as plaintiffs' agent, ceased in *November*, 1821. He never heard of the defendant's intention to apply for his discharge under the Insolvent Debtors' Act until after that time; and he never had any communication with the plaintiffs upon the subject. The date of the defendant's order of discharge was the 1st *March*, 1822, on which day he was actually discharged. In the defendant's schedule he described the debt in question as due not to the plaintiffs, but to *Webb*, in the following terms: "1820. 1821. Mr. *Thomas Webb, Pillgwenlly, Newport, Monmouthshire*, 82*l.* admitted, for coals. He holds a bill of exchange drawn by Mr. *Norris* upon and indorsed by me. Date and other particulars I cannot state." In the order for his discharge, the defendant was described in a corresponding manner. Two objections were taken to the sufficiency of the discharge pleaded; first, because the plaintiffs' debt amounted to 82*l.* and *two shillings and sixpence*, whereas the debt mentioned in the schedule and order was only 82*l.*; and second, that the debt was described as due to *Webb*, instead of the plaintiffs. The learned judge was of opinion that the discharge was a bar to the action notwithstanding these objections, and directed a nonsuit, but gave the plaintiff leave to move to enter a verdict for 96*l.* 6*s.* 6*d.*, the amount of principal and interest.

W. E. Taunton now moved accordingly, and renewed the objections taken at the trial. The Insolvent Debtors' Act, 1 *Geo.* 4. c. 119. s. 6. requires that the prisoner shall deliver into the Insolvent Debtors' Court, within a time therein mentioned, after his petition shall have been filed, a schedule, containing "a full and true description of all and every person and persons to whom he shall be then indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively." Now the defendant has not complied with these requisites of the statute; first, he has not

fully and truly described the amount of the plaintiffs' debt; and second, his schedule does not contain a description of the plaintiffs as his creditors. In the first place the defendant, in describing the amount of the debt as 82*l.* only, gave no notice to the plaintiffs that it was their debt; he ought to have described it according to the precise amount, namely, 82*l.* 2*s.* 6*d.* But secondly, the more material objection is, that he has not fully and truly described the persons to whom he was indebted or who to his knowledge or belief had a just claim to be creditors. The defendant could not plead ignorance that the plaintiffs were the real creditors in these coal transactions, for he perfectly well knew from the invoices, as well as from his correspondence, written and oral, with *Webb*, that the plaintiffs were the persons with whom he was contracting, and to whom he was immediately liable. This dealing with *Webb* as the agent of the plaintiffs could not bring him within the operation of the rule laid down in *George* v. *Claggett* (*a*) and *Rabone* v. *Williams* (*b*), and that class of cases, because supposing the defendant to have been sued by the plaintiffs, he could not have set off a debt due to him from *Webb*, still less could the latter have sued the defendant for the amount of the coals. Here the plaintiffs were the persons to whom the defendant could not but have known he was legally liable, and therefore, having omitted them in his schedule, his discharge is no bar to the present action.

ABBOTT, C. J.—The Insolvent Debtors' Act requires that the prisoner shall deliver into court a schedule containing "a full and true description of all and every person and persons to whom he shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner." By the 16th section it is enacted, "that the Insolvent Debtors' Court

(*a*) 7 T. R. 359. (*b*) Id. 360.

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shall forthwith, after the prisoner's petition and schedule shall have been respectively filed, cause notice thereof to be given to the creditors at whose suit the prisoner shall be detained, or the attorney or agent of such creditors, and to the other creditors named in the schedule of the prisoner, or such of them as the said court shall think fit, and to be inserted in the *London Gazette*, and also, if the said court shall think necessary, in some other newspaper or newspapers, and shall appoint a day and place for the hearing of the matter of such petition, &c." The question is, whether that which this act requires has been complied with by the present defendant. I think, that in order to carry into effect the object which the legislature had in passing this act, we ought to give it a liberal and beneficial construction in favor of the prisoner. If we are to say that the insolvent is bound to give in his schedule "a full and true description," in the literal sense of those words, of all and every person and persons to whom he shall be indebted, or who to his knowledge or belief shall claim to be his creditors, then if a person happens to have been trading with a company, (not chartered,) consisting perhaps of twenty or thirty persons, he must give the names of every one of the persons forming such company, although, peradventure, he only knows one or two. That would certainly be the literal construction of the words. Now it cannot be contended that such a construction ought to be given to the statute; and therefore we must see whether, in this particular instance in which the question arises, the defendant has put down in his schedule such a reasonable description of his creditors, as will put them on their guard, if they will look to the *London Gazette*, which the act of parliament makes the medium of notice, and will give them an opportunity of opposing the prisoner's discharge, if they think fit so to do. Two objections are made to this schedule; first, that it does not contain a true description of the amount of the debt; and second, that it does not contain a true description of the creditors. As to the amount of the debt, the difference is only two shillings

and sixpence. It is contended we cannot say that two shillings and sixpence shall be left out of the description on account of the smallness of its value, unless we also go the length of saying that *pounds* may be equally left out. But I think the amount of the debt thus described is so nearly accurate, as manifestly to shew that the defendant intended fairly to describe the debt, and give to his creditors such means of information as would enable them at once to understand that their debt was intended to be described. The defendant says in his schedule that the debt is 82*l*. for coals. It is impossible for us to say, that if the plaintiffs had directed their attention to the schedule, they must not have understood this to apply to the demand which is made the subject of the present action. If, indeed, the sum mentioned varied materially from the real amount, that might be sufficient evidence of an intention to misle the plaintiffs, or even if that was not the intention, yet if th description was such as might naturally mislead, and induce them to think it was not their debt, I should have said the description was not sufficient; but where the difference is so minute, as that it could not have that effect, it seems to me that all that the act requires has been substantially complied with. Then as to the second objection, namely, that he has not given a true description of his creditors; it was quite impossible that the defendant could name these two plaintiffs, for their names had never been mentioned to him. All his correspondence and communication upon the subject of the coals had been with *Webb* alone. The only name ever mentioned to him was that of the *Argood* Coal Company, except that on one occasion *Webb* told him that Mr. *Fothergill* "owned great part of the concern;" but this gave him no information as to what shares Mr. *Fothergill* had in it. On another occasion it is true *Webb* spoke to him of an unwillingness to accept some securities offered to him, lest he should be blamed by his *employers*. Undoubtedly that was information to the defendant at that time, that *Webb* had employers, but that was a single expression

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passing in a conversation, which might very likely escape the attention or recollection of the person to whom it was addressed. It is true that invoices were delivered in the name of the *Argood* Coal Company, but this was consistent with a belief on the part of the defendant that *Webb* might be a partner in the company. The defendant delivers both the securities in question to *Webb*, one of which is made payable to the latter by name. It is alleged in the declaration that they were both indorsed to the plaintiffs. This, it is true, is giving the promissory notes their legal effect, but it is by no means inconsistent with ignorance on the part of the defendant that *Webb* had indorsed them to the plaintiffs. Might not this defendant really and reasonably suppose that *Webb* was the holder of the notes at the time he prepared his schedule, and was the person to whom notice ought to be given in order to entitle him to his discharge? I think he might very reasonably suppose that *Webb* was the only person entitled to the amount of the notes, and his liability to that debt being expressed in the schedule, it was by no means calculated to mislead the real creditors; but was on the contrary calculated to give them notice that this was the present very debt from which the defendant sought his discharge. I therefore think that the act of parliament has been sufficiently complied with, and I am of opinion that a more rigid and literal construction would in many cases defeat the object of the legislature and prevent a debtor, who has really given his all, and meant fairly and honestly to divide his effects among his creditors, from having that benefit and security which the legislature meant to provide.

BAYLEY, J.—If the plaintiffs had looked to the defendant's schedule they must have understood that the debt there described as due and owing to *Webb*, was intended to describe the debt supposed to be due and owing to themselves; for it is stated to be a debt due for coals. They must also have known that he was dealing with their house for coals,

and as he described the very securities upon which he is now sued, they could not possibly have been misled. It appears to me, therefore, that the defendant had substantially complied with the Insolvent Debtors' Act, and that the discharge pleaded is an answer to this action.

LITTLEDALE, J. concurred.

HOLROYD, J. was absent.

Rule discharged.

LYTTLETON v. CROSS and another, Executors of LUSH.

Wednesday, May 4.

Where defendants, at assizes, pleaded a plea puis darrein continuance, to which plaintiff having replied, defendants demurred to the replication, and obtained judgment on demurrer:— Held, that they were entitled to the costs incurred since the plea puis darrein continuance only.

COVENANT against executors. Pleas, plenè administravit, and a retainer by one defendant, with the consent of the other, for his own debt. At the assizes defendants pleaded a plea puis darrein continuance, to which plaintiff having replied, defendants demurred to the replication, and obtained judgment on the demurrer (*a*). A rule having been subsequently obtained for taxing the whole costs of suit for the defendants,

R. Bayly now shewed cause. The very utmost the defendants can claim are the costs incurred since the plea puis darrein continuance; but it will be found that they are not entitled to any costs at all. The only foundation for their claim is the statute 8 & 9 *W.* 3. c. 11. s. 2. (*b*), which was

(*a*) Ante, vol. v. 175.

(*b*) Which states that "forasmuch as for want of a sufficient provision by law for the payment of costs of suit, divers evil-disposed persons are encouraged to bring frivolous and vexatious actions, and others to neglect the due payment of their debts: be it further enacted, that if any person or persons shall commence or prosecute in any court of record, any action, plaint, or suit, wherein upon any demurrer either by plaintiff or defendant, judgment shall be given by the Court against such plaintiff; or if at any time after judgment given for the defendant in any such action, plaint, or suit, the plaintiff shall sue any writ of error to

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passed for the purpose of preventing frivolous and vexatious suits. But this was not a frivolous or vexatious suit. When the cause was commenced the plaintiff had a substantial right of action, and that was defeated only by matter ex post facto, which the plaintiff had no means either to anticipate or prevent, and which the defendants pleaded puis darrein continuance. Before the statute passed, there would have been no pretence for this rule; and as the case does not come within the purview of the statute, the rule cannot be supported now. No case can be found expressly in point, but in *Toms* v. *Lloyd* (a) the Court gave to the statute the construction now contended for.

Campbell and *Jeremy*, contrà. The defendants are entitled to the whole costs of suit. The words of the statute are that the defendant shall recover "his costs;" it makes no distinction between costs before and after plea. The plaintiff proceeded after the plea puis darrein continuance at his peril, for he might then have taken judgment of assets, quando acciderint. If he had done that, he would have sheltered himself from the payment of any costs; but as he elected to proceed, he has placed himself in the same situation as a party who proceeds with a suit, after money has been paid into Court; and, under such circumstances, if the plaintiff eventually fails, it has been held that he is liable for all costs. *Jeffs* v. *Smith* (b). As to the decision in *Toms* v. *Lloyd*, it has no bearing upon the present case, for it proceeded upon entirely different grounds, namely, that judgment on demurrer to a plea in abatement was not conclusive of the

annul the said judgment, and the said judgment shall be afterwards affirmed to be good, or the said writ of error shall be discontinued, or the plaintiff shall be nonsuited therein; the defendant in every such action, plaint, suit, or writ of error, shall have judgment to recover his costs against every such plaintiff, and have execution for the same by capias ad satisfaciendum, fieri facias, or elegit.

(a) 12 Mod. 195. 1 Ld. Raym. 337. S. C.

(b) 4 Taunt. 196.

merits of the case; and the same rule was afterwards laid down in *Garland* v. *Exton* (*a*). 1825.

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BAYLEY, J. (*b*).—I am of opinion that the defendants are entitled to *their costs*; but I take those words to mean, those costs incurred since the time of pleading the plea puis darrein continuance, and those only. The enacting clause of the act of parliament is not confined, like the preamble, to persons *bringing* frivolous and vexatious suits, for the words there are "commence or *prosecute*;" and we must not forget that an action very properly and conscientiously commenced, may be most frivolously and vexatiously prosecuted or continued. I think the present is an instance in point. When the plea puis darrein continuance was pleaded, the plaintiff had his election either to submit or to proceed with the action. He elected to proceed, and put upon the record a replication, which was subsequently held to be bad in law. The subsequent costs, therefore, were incurred by his own act, and for those costs I think he is liable; but for those only, because he had good grounds for commencing, though not for proceeding with his action.

HOLROYD, J.—I am of the same opinion. The plaintiff had a good cause of action when he commenced the suit; therefore the defendants are not entitled to all the costs. But they are entitled to some costs, for the suit was improperly proceeded in. The true construction of the statute seems to me to be, that the plaintiff is to pay the costs so far only as he has wrongfully prosecuted the action. In the present case, that is since the plea puis darrein continuance only, and therefore he is liable for those costs only which have been incurred subsequent to that period.

Rule absolute.

(*a*) 2 Ld. Raym. 992. (*b*) *Abbott*, C. J. was absent.

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The record of a conviction *by default*, upon the 5 *Ann.* c. 14. must shew that the defendant has been *personally* summoned to appear to the information.

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CONVICTION of the defendant, *by default*, on the statute 5 *Ann.* c. 14. for killing game, which being returned into this Court by certiorari,

Carter moved that it be quashed, for not shewing on the face of it that the defendant had been served *personally* with the summons to appear to the information. On the bare suggestion of this defect, the Court called upon

W. E. Taunton, contrà, who contended that personal service of the summons was unnecessary, and certainly need not be stated on the record. Here the record stated that the defendant had been "duly summoned," which imported all reasonable circumstances, and the Court would intend a personal service to have taken place if that were necessary. But here enough was to be collected from the record, that there had been in fact a personal service of the summons. In *Rex* v. *Simpson* (*a*) an averment "licet debitè summonitus ad hoc tempus et hunc locum" (referring to the day and place of the conviction) was held to be sufficient: and in 8 *Mod.* 309. *Parker*, C. J. cites this case as an authority that "having been summoned" is sufficient. In *Regina* v. *Green* (*b*), *Powis*, J. was of opinion that the allegation "debitè summonitus" imported all reasonable circumstances. There is no express authority in the books, that the summons must appear to have been personal. Service at the party's last place of abode would be quite sufficient.

Abbott, C. J.—Without giving any opinion that a personal service in all cases is absolutely necessary, it is sufficient to say that, in this case, no sufficient substantial personal service appears to have taken place, and therefore the conviction must be quashed.

(*a*) 10 Mod. 248, 382. 1 Stra. 46. S. C. (*b*) 10 Mod. 213.

BAYLEY, J.—It is consistent with every analogy that a party shall not be concluded, without personal service of the process which is to affect his liberty. It is laid down in *Burn, Boscawen, Nares* and other text books (*a*), that personal service of the summons is necessary, unless where it is expressly dispensed with by statute. Of this opinion was Lord C. J. *Parker* in *Rex* v. *Simpson* (*b*). In that case there was, in fact, a personal service; but the main point decided was, that a defendant who did not chuse to appear after being duly summoned might be convicted in his absence. If the defendant appears and makes a defence, it must be taken that he was duly summoned; but if the conviction is by default, it must be clearly shewn on the face of the record that he had been personally served, and had an opportunity of being heard. Here it could not be stated that the defendant was personally served, because what is recited is repugnant to the fact. In *Reg.* v. *Dyer* (*c*) it was stated that the defendant was summoned to appear and did appear on *Tuesday*, the 17th of *April*, &c. In fact the 17th of *April* fell on a *Friday;* and it being objected that the time of the summons being impossible, it was the same as if there had been no summons, the court quashed the conviction on this ground, saying, " there could be no such day, and therefore he could not appear thereupon; and, when one day is set forth, his appearance on another cannot be intended." This is an authority in principle governing the present case. I think this conviction must be quashed for not shewing that the defendant was personally summoned.

HOLROYD, J. and LITTLEDALE, J. concurred.

Conviction quashed.

(*a*) See 1 *Burn, Tit. Conviction,* 737. Ed. 24. by Chetwynd. *Bosc.* 60. and *Paley on Convictions,* 2d Ed. by *Dowling,* 26.

(*b*) 10 Mod. 345.

(*c*) 1 Salk. 181. Vide *Rex* v. *Picton,* 2 East, 196. 1 Stra. 261. 1 Salk. 383. 3 Burr. 1785. and 1 East, 629.

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The King *v.* The Company of Proprietors of the Oxford Canal Navigation.

By 9 *G.* 3. the *Oxford* Canal Co. are entitled to take certain *mileage* duties upon goods passing along their canal; but by 33 *G.* 3. c. 80. the *Grand Junction* Canal Co. in consideration of the injury which their canal was likely to do the *Oxford*, agreed to pay the latter what are called *compensation rates* in lieu of the former duties for the same sort of goods passing along the *Oxford* to and from the *Grand Junction*, "without any regard to the distance" which they might pass along the *Oxford*:—Held, that the compensation rates were equally liable to be assessed to the poor, with the mileage duties, pro tanto, in each and every parish through which the *Oxford* canal passed.

A canal company, being rateable to the poor as "occupiers of land," can only be rated by the same estimate as other land in the parish, namely, according to the value of their tolls to be let by the year.

UPON appeal against a rate made for the relief of the poor in that part of the parish of *Sow* which is situate within the county of the city of *Coventry*, by which the defendants were assessed in respect of their tonnage dues in that part of the parish, the sessions ordered the said rate to be amended, by reducing the sum on which the said defendants are assessed, to £1200, and the sum assessed to £60; and that the said rate so amended, be confirmed, subject to the opinion of this Court on the following case:

The defendants were incorporated by an act of 9 *Geo.* 3. entitled, "An act for making and maintaining a navigable canal from the *Coventry* canal navigation to the city of *Oxford*," and, by virtue of the powers given to them by the said act, they purchased, and are now the owners of the canal and towing-path in the respondent parish, having no other lands, nor occupying nor possessing any other property therein. By the above-mentioned act they were empowered to demand and enforce the payment of tonnage and wharfage, at a certain rate per mile, for all coal, stones, timber, and other goods carried upon or through their canal; and the tonnage commonly taken by them at the time of making the above rate was one penny per ton per mile, for coals, and one penny halfpenny per ton per mile for other sorts of merchandize. This tonnage is usually called the Mile Tonnage, as distinguished from the compensation tonnage hereinafter spoken of. By a subsequent act of parliament passed in the 33 *Geo.* 3. c. 80. which was an act for making a new canal to be called the *Grand Junction* Canal, after reciting that it was apprehended the making the said

intended canal would be injurious to the company of proprietors of the *Oxford* canal navigation; and that it was agreed that the compensation thereinafter mentioned should be made to them as an indemnification against any such injury, it was (amongst other things) enacted: That instead of the tolls, rates and duties which would have been payable to the company of proprietors of the said *Oxford* canal by virtue of the above-mentioned act 9 *Geo.* 3. and certain other acts of parliament specified, for or in respect of the coals, goods, and other things thereinafter mentioned, and made chargeable with certain rates to the said company, it should be lawful for the said company of proprietors of the *Oxford* canal navigation, to ask, demand, take, and receive, to and for their own proper use and behoof, the respective rates thereinafter mentioned, (that is to say,) for all coals which shall pass from the said *Oxford* canal, into or upon the said intended canal, the sum of 2*s*. 9*d*. per ton, and so in proportion for a less quantity than a ton, *without any regard to the distance the same should pass* upon the said *Oxford* canal; and for all other goods, wares, merchandize, and things, which should pass from any navigable canal into or upon the said *Oxford* canal, and from thence into or upon the said intended canal, or from the said intended canal, into or upon the said *Oxford* canal, and from thence into or upon any other navigable canal, (except certain articles in the act specified,) the sum of 4*s*. 4*d*. per ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same should pass upon the said *Oxford* canal. The act then provides for the collecting and recovering this last mentioned tonnage, and also that in the event hereafter of such tonnage not amounting to certain specified sums within each year, the company of proprietors of the said intended canal should make good the difference; and it points out the mode of ascertaining and recovering such difference. The tonnage payable to the defendants under this last mentioned act is usually called the Compensation Tonnage. No part of the mile or

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compensation tonnage is collected in the parish of *Sow*. The entire length of the *Oxford* canal is 91 miles. The Grand Junction canal unites with it at *Braunston*, and the distance from that place to where it joins the *Coventry* canal, is 34 miles seven-eighths, of which two miles one-eighth are in the respondent parish. This latter canal, viz. the *Coventry*, is the only navigable canal which joins the *Oxford* in this, its northern part, and the proprietors thereof take the tonnage of coals upon two miles of the *Oxford* canal, being the first two miles from the junction thereof with the *Coventry* canal at *Longford*, and the proprietors of the *Oxford* canal take the tonnage of all merchandize (except coals) which are carried upon any part of the *Oxford* canal, and afterwards upon the *Coventry* canal within three miles and a half from the junction of the said two canals at *Longford* aforesaid towards *Coventry*. For coals which pass along the *Oxford* canal in the respondent parish, the defendants receive the mile tonnage if they do not afterwards enter the Grand Junction canal; but if they do, then they receive the compensation tonnage only, whether they have passed into the *Oxford* canal from any other canal or not; for other sorts of merchandize, which pass from the *Coventry* canal into the *Oxford* canal, and thence into the Grand Junction canal, or from the Grand Junction canal into the *Oxford* canal, and thence into the *Coventry* canal, in both which cases such merchandize must necessarily pass through the parish of *Sow*, they receive the compensation tonnage; but in all other cases they receive the mile tonnage. The compensation tonnage is never exactly what the mile tonnage would have been. The defendants derive no profit whatever from their land in the parish of *Sow*, except from the tonnage payable to them by virtue of the above-mentioned acts of parliament, if any part of that tonnage can legally be considered as such. The occupiers of land in the parish of *Sow* are rated in the present assessment, upon the respective rents, taking those rents as a criterion of the value of the land. The defendants are rated upon the full amount of

their tolls, which are calculated to amount to £1200 per annum; whereas the same tolls are worth only £1000 per annum to be rented by a third person.

The questions for the opinion of the Court are,

First, whether the defendants are liable to be rated for any of their tolls in the parish of *Sow;* if not, the assessment on the defendants is to be struck out of the rate.

Second, whether they are liable to be rated in the parish of *Sow* for part of the compensation tonnage for coals passing out of the *Oxford* canal into the *Grand Junction* canal, which have passed along the *Oxford* canal in the parish of *Sow*—if they are not, four twenty-fourths of the sum at which they are assessed are to be deducted from the assessment.

Third, whether they are liable to be rated in the parish of *Sow* for part of the compensation tonnage received in respect of merchandize (not being coals) passing out of any navigable canal into the *Oxford* canal, and thence into the *Grand Junction* canal, in respect of such part of the said merchandize as has passed along the *Oxford* canal in the said parish of *Sow*. If they are not, then eight more twenty-fourths are to be deducted from the sum assessed on the defendants.

Fourth, whether they are liable to be rated in the parish of *Sow* for part of the compensation tonnage, received in respect of merchandize, not being coals, passing out of the *Grand Junction* canal into the *Oxford* canal, and thence into any other navigable canal in respect of such part of the said merchandize as has passed along the *Oxford* canal in the parish of *Sow*. If they are not, then five more twenty-fourths are to be deducted from the sum assessed on the defendants.

Fifth, supposing the defendants to be rateable in respect of the above tolls, or any part of them, in the parish of *Sow*, whether the sum on which they are assessed in the above rate ought not to be reduced to the amount which such tolls would be worth to be rented by a third person.

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Copley, A. G. in support of the order of sessions. After the recent decisions, it will hardly be disputed on the other side, as a general principle, that the tolls of a canal are rateable in each and every parish respectively, through which the navigation passes, in proportion to the quantity of land covered with water in such parish (*a*). [The counsel for the defendants said they could not now dispute this proposition.] The question then is, whether, in this particular instance, the defendants are rateable pro tanto in the parish of *Sow*, for the mileage and compensation tolls which they are entitled to take under and by virtue of the acts of parliament referred to in the case. By the 9 *Geo.* 3. which was passed for the purpose of making a canal from *Coventry* to *Oxford*, the defendants were empowered to take a mileage toll of one penny upon coals, and three-halfpence upon other sorts of merchandize, passing along the *Oxford* canal. That canal runs through a great many different parishes, and amongst others, the parish of *Sow*, and therefore it is properly admitted on the other side that, if the case stopt there, the defendants would be rateable in that parish for a proportion of the tolls taken on the whole line of the canal. By the 33 *Geo.* 3. c. 80. called the *Grand Junction* canal act, which was passed for the purpose of making a communication, by means of a new canal, with the *Coventry* canal and the city of *Oxford*, after reciting that it was apprehended that the making the new canal would be injurious to the proprietors of the *Oxford* canal, by depriving them of a portion of their mileage duties, and that it was agreed that there should be a compensation made to them as an indemnification against any such injury, it was enacted, that, in lieu of the mileage duties payable under the *Oxford* canal act, the proprietors were to be entitled to take certain other rates, namely, 2*s.* 9*d.* per ton upon coals, and 4*s.* 4*d.* per ton for all other goods passing

(*a*) Vide *Rex* v. *The Trent and Mersey*, and the cases there collected, ante, vol. ii. 752; *Rex* v. *Palmer*, vol. ii. 793; and *Rex* v. *The Earl of Portmore*, vol. ii. 798.

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into their canal, and from thence into the intended canal, or from the intended canal into the *Oxford* canal, and from thence into any other canal, without any regard to the distance the same should pass upon the *Oxford* canal. This, which is called the Compensation Tonnage, is given as an equivalent for the Mileage Duty which would otherwise have been payable on the *Oxford* canal. The main question then is, whether the substitution of the compensation tonnage in lieu of the mileage duty makes any difference in principle as to the liability of the defendants to be rated pro tanto in the parish of *Sow*. No difference can possibly be suggested. There is no doubt that, if the *Grand Junction* canal company had not made this agreement with the defendants, the latter would have been entitled to the mileage duty upon goods either passing into the *Oxford* canal from the *Grand Junction*, or vice versâ; and if so, then the mileage duty would have been rateable pro tanto in *Sow*. The operation of the 33 *Geo*. 3. c. 80. is only to substitute one mode of payment for the other, but still the principle of rateability is the same. The compensation duty is to be rated in *Sow*, precisely on the same footing that the mileage duty would have been rateable. Here it is found that all goods passing from the *Coventry* canal into the *Oxford*, and thence into the *Grand Junction*, and vice versâ, necessarily go through the parish of *Sow*, and therefore the rate attaches in that parish upon so much of the duties as are earned by passing through it. Four of the questions proposed for the opinion of the Court all resolve themselves into the same principle. First, as to the general question, that is given up by the other side as untenable. Second, the defendants are clearly liable to be rated in *Sow* for part of the compensation tonnage for coals passing out of the *Oxford* into the *Grand Junction*, which have passed along the former in the parish of *Sow*. Third, upon the same principle, they are liable to be rated for part of the compensation received in respect of other merchandize passing in like manner: and fourth, they are also liable, for the same rea-

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son, to be rated for merchandize passing out of the *Grand Junction* into the *Oxford*, and thence, into any other canal, in respect of such merchandize as passed along that part of the canal in *Sow*. The sessions have fixed the precise sum at which the defendants are to be rated. Upon the fifth and last question, there is no necessity for any argument, the respondents being willing to abide by the decision of the Court upon that point. It is certainly not easy to distinguish the case of the defendants from that of any other occupiers of land, the rateability being incurred in respect of their occupancy of land within the meaning of the statute 43 *Eliz.* c. 2. If land be let, the rent must be the measure of the value. So if tolls be let, the rent must be taken as the measure of the value, and rated accordingly.

Adams, Serj. and *Tindal*, on the same side, were stopped by the Court.

Tancred, *Holbech* and *Goulburn*, contrà. Upon the first question propounded in this case, it is certainly now too late to contend, after the recent decisions upon the point, that if the proprietors of a canal are rateable as occupiers of land, in respect of the profit arising from tolls, they are liable to be rated in each and every parish through which the canal passes. The three following questions, therefore, will depend upon the question whether the 33 *Geo.* 3. c. 80. has not the effect of taking this case out of the operation of that general principle. It will not be denied on the other side that tolls, per se, are not rateable to the poor, and that the only principle upon which they can be rated is, that they are to be considered as profit arising from the land in the parish in which the assessment is made, and consequently that, unless they are referrible to, and necessarily connected with the land itself in that very parish, they are not rateable. If then it can be made out that the compensation tonnage given by the *Grand Junction* canal act to the defendants, is not in any respect connected with, or

referrible to land in the parish of *Sow*, it is not, according to law, the subject of a poor's rate. The question is not in lieu of what it is substituted, but what it is per se. Admitting, as the defendants do, that the mileage tolls collected under the 9 *Geo.* 3. would have been rateable in the parish of *Sow*, if the *Grand Junction* canal act had not passed, still it is submitted that the effect of that statute is to put an end to that liability, and introduce a new mode of compensation, which cannot become the subject of a rate. Now the 33 *Geo.* 3. c. 80. enacts, "that instead of the *tolls*, rates, and duties which would have been payable to the company of proprietors of the said *Oxford* canal by virtue of the 9 *Geo.* 3. for or in respect of the coals, goods, or other things thereinafter mentioned, and made chargeable with certain rates, to the said company, it shall be lawful for the said company to ask, demand, take and receive, to and for their own proper use and behoof, the respective *rates* hereinafter mentioned, (that is to say,) for all coals which shall pass from the said *Oxford* canal into or upon the said intended canal, the sum of 2*s.* 9*d.* per ton, *without any regard to the distance the same should pass* upon the said *Oxford* canal, and for all other goods which should pass from any navigable canal into or upon the said *Oxford* canal, and from thence into or upon the said intended canal, or from the said intended canal into or upon the said *Oxford* canal, and from thence into or upon any other navigable canal, the sum of 4*s.* 4*d.* per ton, *without any regard to the distance the same should pass* upon the said *Oxford* canal." In no sense of the word, can this compensation be considered as *tolls*. The act itself speaks of it as *rates*, not *tolls*; and this distinction seems to have been studiously introduced, for this obvious reason, namely, that in every instance these *rates* are to be paid *without any regard to the distance* that the particular commodities shall pass along the *Oxford* canal. What is called the compensation rate is payable to the same amount on the goods, whether they are carried only the distance of a quarter of a mile, or along the whole length

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of the canal. It is true that the compensation rate is paid as a whole, but still without reference to the distance the goods are carried. These rates only become payable in consequence of the goods passing out of the *Oxford* into the *Grand Junction* canal, or vice versâ. Undoubtedly goods which are carried only upon the *Oxford* canal, and do not go either upon the *Coventry* or *Grand Junction* canals, would be liable to the mileage tolls, and consequently they would be rateable pro tanto in *Sow*. But here the compensation rate is payable without reference to the distance the goods may be carried, and therefore, unless it could be shewn that the land in *Sow* earned something in respect of the compensation rate, that rate would not be assessable in that parish. The parish of *Sow* has no right to rate a profit which is gained by the defendants elsewhere, and totally independent of, and disconnected with, land in that parish. If that part of the canal which is in *Sow* be not traversed by goods, which pay the compensation rate, it cannot be said that *Sow* earns any thing so as to entitle it to come upon the defendants for a contribution. The compensation rate attaches the moment goods pass upon the smallest portion of the *Oxford* canal, and would become payable though they never went upon the land in *Sow*, and therefore that parish cannot be said to have earned anything to entitle it to assess the compensation rate. The definition in the books of a toll traverse, is something paid for the liberty of passing over land of another; but here this compensation is payable though the land in *Sow* be neither passed through or over. [*Bayley*, J. Suppose the *Oxford* canal, instead of passing through many different parishes, passed only through one parish, would not that parish be entitled to a rate upon the compensation duty?] Certainly not, if the argument be well founded, that the effect of the *Grand Junction* act is to abolish the old tolls which were payable on the *Oxford* canal, and substitute something else by way of compensation. This is not to be treated as a profit arising from tolls, but as a money compensation

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for a supposed injury, which is something totally different. This is a compensation growing out of a private agreement between the *Grand Junction* and the *Oxford* canal companies, and ratified by act of parliament. In its very nature it is different from tolls, and is not payable with reference to any particular place, and consequently could not be rated any where. By the act of parliament it is stipulated that if the rates do not amount to a given sum within the year, the *Grand Junction* canal company are to make up the difference. It is wholly immaterial to the defendants whether the rates taken upon the goods amount to more or less, for the *Grand Junction* canal company undertakes to indemnify them to a specific amount; so that this is to be considered as a gross payment, and it is clear that a mere gross money payment is not rateable to the poor. But assuming that these compensation rates are rateable anywhere, they cannot be rateable in the parish of *Sow*. They are given to the defendants as a compensation for the privilege of entering their canal, without any regard to distance, and, standing upon the footing of lock dues, come within the principle of *Rex* v. *Macdonald* (a), and can only be rated where the payment is actually made. Then, lastly, at all events the defendants are rated too high. They can only be assessed at the amount which the tolls would be worth to be rented by a third person; and therefore in that respect the rate must be sent back to the sessions to be amended.

Abbott, C. J.—I am of opinion that the defendants are rateable upon the principle on which they have been rated. It appears to me that we are to construe the two acts of parliament, namely, that by which the *Oxford* canal is established, and the *Grand Junction* canal act, as containing one substantive enactment. First, with respect to coals: if coals pass along the *Oxford* canal without going into the *Grand Junction*, then the company shall receive a rate of so much per ton per mile. The effect of that has been clearly established by several decided cases, namely, that

(a) 12 East, 324

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the company are rateable according to the number of miles which the coals may pass in each particular parish. But if coals pass along the *Oxford* canal, and from thence into the *Grand Junction*, the rate shall be a specific sum, without regard to the number of miles that the coals shall pass. Now although that is the mode in which the rate is to be paid, still it is earned by passing along some part of the *Oxford* canal, and it is earned by passing along that part which lies in every parish through which the coals in that respect may pass. *Sow* is one of the parishes through which coals, in passing into the *Grand Junction* canal, do pass. That part of the canal in *Sow* is a part of the canal in respect of which the tonnage duty is imposed and earned, and the company have in this case been rated in *Sow*, not to the full extent of 2*s.* 9*d.* per ton upon the coals, but only upon such portion of it as is earned in *Sow*, according to the length of the canal in that parish. I therefore think the defendants cannot complain of that principle of rating: for although the subject matter of the rate is called compensation, it is nothing more than a rate given for coals passing along the canal in *Sow* and other parishes through which they may happen to pass. That being the case with regard to coals, I think there is no difference in principle with respect to other goods. The compensation duty on other goods is imposed not merely upon such as pass from the *Oxford* canal into the *Grand Junction*, but there is a further provision, namely, that if they come from some other canal into the *Oxford*, and thence into the *Grand Junction*, and vice versâ, the duty attaches upon them also. But that does not vary the principle upon which the defendants have been assessed. It appears to me most clearly that the company are rateable in the way in which they have been rated for other goods as well as coals. Then comes the question as to the amount of the rate, namely, whether the company are to be rated at the full value of these tolls or duties, or only in such proportion as lands are rateable in the parish. It appears that in this parish land is rated according to the rent that may be obtained for it: and I think that as this

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canal is rateable upon the principle of being so much land covered with water, it ought to be rated as other land, namely, at the amount at which it would let to a third person. The effect of that will be that the rate, instead of being an assessment of 1200*l.*, will stand at 1000*l.*

BAYLEY, J.—I am of opinion that the compensation duty and the mileage duty stand precisely on the same footing, and both are equally liable to be rated. The mileage duty is rateable because the company are occupiers of land, consisting of a carriage-way and towing-paths, yielding to them certain profits in the name of tolls. That duty, therefore, is to be considered as rateable, upon the principle that the company are occupiers of land. Then what is the origin of what is called the compensation duty? The *Oxford* canal company being the proprietors of nearly the whole of the land from one end of the canal to the other, and the *Grand Junction* canal company having occasion from time to time to use the *Oxford* canal, make their bargain with the defendants as to the terms on which their canal shall be used. A person wishing to send goods by the *Grand Junction* canal, and thence by the *Oxford* canal, would naturally estimate the costs and charges of sending them along the whole line from one end to the other; but if he finds that he will have to make a heavy payment, in the shape of a mileage duty, for sending them along the *Oxford* canal, he will pause whether he will adopt the *Grand Junction* canal as a mode of transmission. It would, therefore, be beneficial to the *Grand Junction* canal company to make some bargain with the *Oxford* canal company as to the terms on which the public shall be at liberty to use their canal. Accordingly a bargain is made, and the terms are, that persons sending coals either backwards or forwards by the *Grand Junction*, shall be at liberty to use the *Oxford* canal upon paying 2*s.* 9*d.* per ton, and for other goods and merchandize at the rate of 4*s.* 4*d.* For what are these two sums paid? It seems to me that they are paid for the same thing that the mileage duty would be paid, namely, for the use of the

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canal, and for the privilege of having the goods carried along it. The fallacy of the argument for the defendants arises from comparing this case with that of a sluice or lock. It is said that this is nothing more than a sluice, and that the public do not pay for going along the *line* of the *Oxford* canal, but merely pay for passing into or out of the *Grand Junction* canal. If that were the true way of stating the case, the analogy would be correct, and then I agree that, as a sluice, it would not be rateable in the parish of *Sow*. But the fact is that the payment is not made for passing into or out of the *Grand Junction* canal; but for the use which persons having goods upon that canal may wish to make of the *Oxford* canal. Then it is said that this is one gross payment, and attaches whether the party goes along the whole line of the canal, or a short distance only. The defendants make their own bargain in that respect. The whole line of the canal belongs to them, and therefore they make their agreement as to whether the sum shall vary according to the distance the canal is used; but when we come to the question of rateable or not, then it must be decided according to the rights of the different parishes between whom the mileage rates would otherwise be divided. It seems to me that the mode of rating adopted in the parish of *Sow* is one of which the defendants cannot complain, for the overseers only claim in respect of those goods which pass through their parish, with reference to the distance of the whole length of the canal. As to the amount, however, of the rate, I agree that the defendants should be assessed according to the principle of rating land in the same parish; and, as that is according to the annual rent, I think the defendants ought only to be rated according to the annual value of the tolls to be let by the year, and therefore the assessment must be reduced from 1200*l*. to 1000*l*.

LITTLEDALE, J. concurred (*a*).

Order of sessions confirmed, but the rate to be amended as directed by the Court.

(*a*) *Holroyd*, J. was absent.

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A servant in husbandry hired himself three weeks before *Martinmas* at the wages of £4, and received 1*s.* earnest from his master. No time was mentioned. He was to go into the service a week after *Martinmas.* On the day of his arrival his master said, "It is not the custom to hire servants in this parish for more than 51 weeks, which I forgot to mention to you at the time I hired you at *B.*, and therefore, if you have no objection, I must hire you afresh for 51 weeks, and give you another shilling for earnest," which the servant accepted and remained in the service until the *Martinmas* following:—Held, that the sessions did right in determining that this was no settlement.

TWO Justices by their order removed *John Whitehead* and *Mary* his wife from *Bottesford* in the county of *Leicester* to *East Bridgeford* in the county of *Nottingham.* The sessions on appeal quashed the order, subject to the opinion of this Court on the following case:

The pauper, *John Whitehead,* was hired at the *Bingham* statutes, which happened about three weeks before *Martinmas,* 1818, to serve one *Huskisson* of *East Bridgeford* as a servant in husbandry, for the wages of £4, and received 1*s.* earnest; but no time was mentioned. He was to go into the service about a week after *Martinmas,* at the regular time for husbandry servants to enter their places. The pauper, who was the only witness examined by the respondents, stated that he entered into the service a week after *Martinmas,* 1818; that on the same day on which he arrived at his master's house, his master said to him, "It is not the custom to hire servants in this parish for more than 51 weeks, which I forgot to mention to you at the time I hired you at *Bingham* statutes, and therefore if you have no objection, I must hire you afresh for 51 weeks, and give you another shilling for earnest," when the pauper accepted of such earnest. The pauper was never out of *Huskisson's* service from the first moment he came upon the premises, and remained therein at *East Bridgeford* until the day after *Martinmas,* 1819, when he quitted his place, along with the other servants, having first received his wages of £4. The question for the opinion of this Court is, whether the pauper gained a settlement in *East Bridgeford.*

Scarlett, G. Marriott, and *Humfrey,* in support of the order of sessions. This was solely a question of fact for the sessions, and they have drawn the right conclusion. Assuming that the original hiring was a hiring for a year,

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still there was no service under it to confer a settlement, for the pauper did not enter until a week after *Martinmas*, and there is nothing to shew that this was a dispensation of that portion of the service. But at all events it was competent for the parties to rescind the contract, and enter into a new bargain if they thought proper. This was effected by what took place afterwards; for the pauper then consented that the hiring should be for 51 weeks, and took one shilling to bind the bargain. There is nothing like fraud in this part of the transaction, which, if there was, ought to have been found by the sessions. It is, therefore, perfectly clear, in either view of the case, that there was no hiring, or service for a year to confer a settlement. They cited *Rex* v. *Market Bosworth* (a), *Rex* v. *Winton* (b), *Rex* v. *Sulgrave* (c), *Rex* v. *Apethorpe* (d), *Rex* v. *Denham* (e).

S. M. Phillipps and *Hildyard*, contrà. In this case the sessions have not come to a conclusion upon conflicting evidence, of which they would undoubtedly be the most competent judges, but have decided upon the testimony of the single witness examined; and if they have drawn an erroneous conclusion in point of law from the facts deposed to, it is the province of this Court to set their decision right. It is admitted on the other side, that there was originally a general hiring for a year, and consequently if there was a service under it, a settlement was gained. If there was a general hiring, it must be taken to have commenced at *Martinmas*. Now though the service did not actually commence until a week afterwards, yet it must be taken, from the facts stated in the case, that there was a dispensation of the first week. The service was not to commence until a week after *Martinmas*, which was the regular time for husbandry servants to enter their places. It is a well known practice in hiring husbandry servants, to allow them the first week to go and see their friends. This is indeed a general

(a) Ante, vol. iv. 306. (b) 3 B. & A. 298. (c) 2 T. R. 376.
(d) Ante, vol. iv. 487. (e) 1 M. & S. 221.

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custom, and hence the provision in the contract, that the service was not to commence until a week after *Martinmas*. Receiving the pauper afterwards by the master upon the footing of this contract shews decisively that this was a dispensation. This is simply the case of a general hiring for a year, the master giving the servant the first week for himself. It was not competent for the master afterwards to rescind the contract, and defeat the settlement, being legal in its inception. The court will treat the second contract as a fraud upon the settlement, and hold that the sessions have come to a wrong conclusion. They cited *Rex* v. *Wintersett* (*a*), *Rex* v. *Fillongley* (*b*), *Rex* v. *Grantham* (*c*), and *Rex* v. *Adson* (*d*).

ABBOTT, C. J.—I think the sessions came to the right conclusion. I agree that there was originally a contract which operated in point of law as a hiring for a year, but I think that the service under it could not be considered as commencing until a week after *Martinmas*. It is true the case states that the pauper was hired about three weeks before, but he was not to go into the service until a week afterwards. That fact appears to me to be decisive that the service was not to commence until a week after *Martinmas*. Certainly it was not to commence on the day the contract was made, for that was entered into three weeks before. If then it was a hiring for a year, the service to commence the week after *Martinmas*, it is clear that there has not been a service for a year under that hiring. Did then the master dispense with the services of the pauper for that week in the year, or was the contract between the parties rescinded? The case states, that on the same day when the servant arrived at his master's house, the latter said to him, "It is not the custom to hire servants in this parish for more than 51 weeks, which I forgot to mention to you, and therefore, if you have no objection, I must hire

(*a*) 2 Bott, 443.
(*b*) 1 B. & A. 319.
(*c*) 3 T. R. 754.
(*d*) 5 T. R. 98.

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you afresh for 51 weeks, and give you another shilling for earnest." To this the servant makes no objection, but takes the shilling by way of earnest. If I were to draw my own conclusion from these facts, I should construe that as a dissolution of the original contract, and the substitution of another. It is said that this was a fraud.* I own I have always had great difficulty in finding out upon whom the supposed fraud is committed, in cases of this nature. But if this case is to be treated as a fraud, then it was for the sessions to find it out, and unless they do so, this court cannot, upon authorities, hold it to be a fraud. That is entirely a question of fact; but the sessions have not found it to be a fraud. I must therefore consider this as a dissolution of the original contract, and the substitution of a new one in the place of it, and not a dispensation of the week's service. I do not, however, say that, if the sessions had drawn a contrary conclusion, it would not have been as satisfactory to my mind as that which they have actually drawn.

Bayley, J.—I think this was properly a point for the decision of the sessions, and I should be glad if the sessions would understand that it is their duty to decide questions of fact, and not send them up to this Court for decision; the expense brought upon parishes in the discussion of such cases is enormous, and tends to increase parish rates to a mischievous extent. A general hiring may be a hiring for a year, or it may be for less than a year. If there be a general known custom in a parish to hire servants for less than a year, the general hiring would be for the customary period, and not for a whole year. Whether such a custom exists in this parish, is not communicated to us one way or the other. It was a fact which the sessions might have very easily ascertained, but the case is silent upon the subject. I agree that there may be a dispensation, either at the commencement, in the middle, or at the conclusion of the year; but whether there is a dispensation or not, is a question of fact for the sessions to decide. If there had been a hiring

here for a year, to commence at *Martinmas*, and the contract had not been dissolved by the express consent of both parties, then the sessions might have drawn a conclusion different from what they have drawn. Suppose this to have been originally a hiring for a year, still, when the servant came home, it was competent for him and his master, by mutual consent, to limit the duration of the service, and put an end to the first contract. But still it was for the sessions to decide, as a question of fact, whether the contract had been dissolved by mutual consent. So, if there was fraud in the case, that was for their decision, and not for the decision of this Court, who have no means of determining the question affirmatively or negatively. Upon the ground, therefore, that in this case the sessions was the proper tribunal for the decision of the question, and not being able to see, from the materials which have been laid before the Court, that they have come to a wrong conclusion, I think their order must be confirmed. My own judgment is, that the sessions have drawn the right conclusion from the facts stated.

Holroyd, J.—I think it cannot be taken, from the manner in which the case is stated, that this was originally a hiring from *Martinmas*, although it was most probably the intention of the parties that it should be so considered. It was part of the agreement that the pauper was to go into the service a week after *Martinmas*. If that was so, then the hiring must be considered as taking effect from the time that he actually went into the service; although I think the hiring is to be taken as a hiring for a year. The doubt I have had in the case is, whether the master would not have had a right to the pauper's services *from Martinmas*, but for the stipulation that he need not come till a week afterwards. If it had been stated in the case that the hiring was to commence at *Martinmas*, but that the pauper was to have a week to see his friends, then there would have been no doubt that the master would have had a right to his ser-

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vices, but for that arrangement. The sessions have not found the subsequent agreement entered into, to be bottomed in fraud, and we cannot intend that there was any fraud. If it be a fraudulent transaction at all, it can only be so with reference to the law; for if the law says that a hiring for a year shall at all events confer a settlement, but the master stipulates to have the benefit of the pauper's services without running the risk of bringing a burden on his parish, then if that be fraudulent, it is fraudulent only as against the statute: there is no fraud upon either the pauper or the parish. If the pauper consents to the arrangement, he does so with a full understanding of the object of the stipulation, and no fraud is imposed upon him. As respects the parish, it is a benefit rather than an injury, by preventing the pauper from gaining a settlement there. The latter part of the case, therefore, removes all the doubt I had entertained as to whether this was to be considered as a hiring for a year, and a dispensation of the first week's service; for what afterwards takes place must be considered as a dissolution of the original contract with the consent of both parties, and consequently a hiring and service for 51 weeks will not confer a settlement. I think we must confirm the order of sessions.

Littledale, J. concurred.

Order of sessions confirmed.

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Where a parish certificate, thirty-five years old, was granted by two persons who described themselves on the face of it to be "the major part of the churchwarden and overseer," and there was evidence on one side, that both before and ever since the certificate was granted, but one overseer had acted in the parish, and on the other that in two instances, at least, two overseers had been appointed, though only one had acted:—Held, that the Sessions might reasonably intend, as a question of fact, that there had never been more than one overseer appointed, and consequently that the certificate was valid.

TWO Justices by their order, dated 20th *October*, 1823, removed *John Bird*, *Mary* his wife, and their three children,

from the parish of *Earl Shilton*, in the county of *Leicester*, to the parish of *Foleshill*, in the county of the city of *Coventry*. The Sessions on appeal quashed the order, subject to the opinion of this Court on the following case:

The pauper's birth settlement at *Foleshill* being admitted, the appellant proved a subsequent settlement at *Earl Shilton*, by apprenticeship to one *John Smith*, who resided there; but who, the respondents contended, was a certificated person from the parish of *Croft*. The certificate was as follows:

"The county of *Leicester*, to wit. } To the Churchwarden and Overseer of the Poor of the parish of *Earl Shilton*, in the county of *Leicester*, or to any of them.

"We *John Brookes* and *William Frone*, being the major part of the Churchwarden and Overseer of the Poor of the parish of *Croft*, in the county of *Leicester* aforesaid, do hereby own and acknowledge that *John Smith* and *Sarah* his wife, and *Elizabeth* his daughter, and their future issue, to be our inhabitants legally settled in the parish of *Croft* aforesaid. In witness whereof we have hereunto set our hands and seals the first day of *June*, in the 29th year of the reign of our sovereign Lord *George*, by the grace of God, of *Great Britain*, *France*, and *Ireland*, King, Defender of the Faith, and so forth, and in the year of our Lord 1789.

"*John Brookes*, Churchwarden. (L. S.)
"*William Frone*, Overseer of the Poor. (L. S.)

"Attested by *Henry Armston*.
Edward Stevens.

"*Leicestershire*, to wit. We whose names are hereunto subscribed, two of his Majesty's Justices of the Peace for the county of *Leicester* aforesaid, do allow of the above written certificate; and we do also certify that *Henry Armston*, one of the witnesses who attested the execution of the said certificate, hath made oath before us that he did see the

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churchwarden and overseer, whose names and seals are to the said certificate subscribed and set, severally sign and seal the said certificate, and that the names of the said *Henry Armston* and *Edward Stevens*, whose names are above subscribed as witnesses of the said certificate, are of their own proper hand-writing. Dated the 8th day of *June*, 1789.

"*Robert Abney*.
"*T. Greaves*."

It was a printed form, with the blanks filled up, and the final "s" had been erased from the printed words "*churchwardens and overseers*" wherever they occurred, whether in reference to the certifying or certificated parish. The counsel for the appellants in answer to this, and in order to prove that there was but one overseer for the parish of *Croft*, at the time of the certificate being granted, proved that *J. Brookes* and *W. Frone*, named in the certificate, were dead; that the parish chest of *Croft* had been searched, and that the warrant of *W. Frone's* appointment as overseer could not be found there; that *Joshua Clarke* and *Joshua Frone* acted as the executors of *W. Frone*, and that *Clarke* was the survivor, but did not produce the probate copy of *W. Frone's* will, or offer any other proof of the appointment of the said *J. Clarke* and *J. Frone* as executors; that application had been made to the said *J. Clarke* as surviving executor, and to the solicitor whom the executors employed, and to the surviving children of *W. Frone* living in *Croft*, and to the existing parish officers, for the appointment of *W. Frone* as overseer. The appellants then called two witnesses; one who had lived in *Croft* thirty-six years, and had served the office of overseer six years before, jointly with another person, but could not say whether he had before that time heard of more than one overseer. He admitted, however, that he only had acted when he was overseer. The other witness, who was parish clerk and had lived seventy years in *Croft*, said he never heard of more than one overseer for the parish in former times, but admitted that he had never attended the parish meetings, and knew nothing with regard to the ap-

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pointment of the overseers. The appellants then put in the parish book of *Croft*, containing many entries prior and subsequent to, though not at the time of the certificate, respecting overseers, as follows: " *A. B.*, the late overseer, gave up his accounts as overseer to *C. D.*, the present overseer." Upon this the respondents called a witness, who was churchwarden of *Croft* and had served the office of overseer twenty-six years before, jointly with another person, but he only had acted, and for as long as he could remember one only had acted. They then proved the appointment of two overseers for the years 1813 and 1818, the memoranda of whose accounts being given up were in the said parish book as follows: " *A. B.* gave up his accounts as overseer of the poor." Upon this evidence the court of Quarter Sessions quashed the order, subject to the opinion of the court of King's Bench on the following questions: first, whether the appellants had shewn sufficient search to enable them to offer secondary evidence of the appointment of overseers; and second, whether the evidence which they gave, together with the objections on the face of the certificate, was sufficient to invalidate it.

The first point being now given up (*a*) by the respondents,

Copley, A. G. and *S. M. Phillips*, in support of the order of sessions, addressed themselves to the second. The question is, whether there was sufficient evidence to warrant the sessions in drawing the conclusion that there had been only one overseer appointed for the parish of *Croft*; for if there was, then the certificate acknowledging the pauper's master to belong to that parish is valid and binding. This was a question of fact for the sessions, and whether their decision was right or wrong, it is conclusive. All the evidence adduced on the part of the appellants tended to shew that there had never been more than one overseer appointed for this parish. This was rebutted by two instances only, in which

(*a*) See *Freeman* v. *Arkell*, 3 D. & R. 669.

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there appeared to have been two appointed, but in those but one of the overseers had acted. The case of *Rex* v. *Morris* (*a*), is an authority to shew that if it be not usual to appoint more than one overseer, the appointment of one will be valid. But after the lapse of 35 years, as in this case, the Court will intend that the certificate was valid. Every intendment is to be made in favour of a certificate which has been allowed by justices; and the doctrine laid down in *Rex* v. *Catesby* (*b*), is expressly in point with the present case. Admitting that the session might reasonably have drawn a different conclusion from the evidence, still, as it was purely a question of fact, their decision is binding.

G. Marriot, *Humfrey*, and *Barnaby*, contrà. If the sessions have manifestly drawn a wrong conclusion from the evidence, the Court will send the case down to be reheard. Here it is obvious that a wrong conclusion has been drawn. The case of *Rex* v. *Catesby* has corrected a long prevailing impression which had existed with respect to the mode of establishing a settlement by certificate. That case, however, is distinguishable from this; for there the certificate upon the face of it shewed that it was granted by persons who described themselves as the *only* churchwarden and the *only* overseer of the poor of the parish. Here there is no such designation of the churchwarden and overseer, who signed this certificate; on the contrary, they are described as "the major part of the churchwarden and overseer." The evidence for the respondents proved that there had been, at least, in two instances, two overseers appointed, and if so, then this is not a valid certificate within the 8 and 9 *W*. 3. c. 30., not having been executed by a majority of the parish officers. If the evidence had been silent as to the appointment of a second overseer, then the sessions might reasonably have intended that there had never been more

(*a*) 4 T. R. 550.

(*b*) Ante, vol. iv. 434. See 4 T. R. 797; 2 East, 175; 8 Id. 334; 12 Id. 561; 13 Id. 143; 1 B. and A. 275.

than one appointed by custom, according to the cases; but this intendment could not be made in the face of the fact, that in two instances, at least, two had been appointed.

Abbott, C. J.—I agree with the law as laid down in *Rex* v. *Catesby*, that every intendment is to be reasonably made in favour of a certificate, allowed as this has been by two justices of the peace; and if the sessions had in this instance intended from the evidence before them, that there had been two overseers appointed for the parish of *Croft*, instead of one, I should have been perfectly satisfied with their decision. I should myself have drawn a different conclusion, but still it was a question for them upon the evidence, and as they were of opinion that there was only one, I cannot say (although I should have been better satisfied if they had come to a different conclusion) that they have done wrong. The order of sessions must therefore be confirmed.

Bayley, J.—I certainly should have drawn a different conclusion from the evidence in this particular case, than that which has been drawn by the sessions, but, unless a reasonable intendment is made in favour of the legality of the appointment of overseers, the effect would be, not only to make void the certificate, but the binding of the apprentice also. Undoubtedly I should have leaned in favour of the certificate; first, because it was 35 years old; and second, because in the instances adduced of an actual appointment of two overseers, only one had ever acted. The fair inference was, that 35 years since there had been only one appointed, because from that time to the present there had been only one acting, and even in the years 1813 and 1818 when there appeared to have been two duly appointed, still, in those years, only one acted. Although I should have drawn a different conclusion from the evidence, still it was for the sessions to decide upon the case as a question of fact; and I cannot help expressing a hope, that the practice (which I call mischievous) which has obtained at some

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sessions in this kingdom, of sending up to this Court questions of fact, in order that we may see whether the sessions have drawn the right conclusion, may be corrected. The sessions only are to determine questions of fact.

Holroyd, J. concurred (a).

Abbott, C. J.—I agree with my brother *Bayley* in the observation with which he has concluded. It certainly is to be wished that justices at sessions should have firmness enough to abide by their own decisions on matters of fact, instead of sending them to this Court for revision. If there should be occasionally an error in the conclusion which they draw from facts, it is a much less evil than the expense of litigation in which parishes are involved by the urgency of parties to have cases granted.

Order of sessions confirmed.

(a) *Littledale*, J. was absent.

Wednesday, May 4.

The King v. The Inhabitants of Sturton-by-Stow.

Where a pauper hired a house and land three weeks after *May-day* 1820, to *May-day* 1821, at 15*l.* a year; and at *May-day* 1821, hired it again at the same rent for a year; and resided in the house and occupied the land from the date of the first hiring upwards of a year, and paid the rent:—Held, that this was renting a tenement within the intent and meaning of the 59 *G.* 3. c. 50. and conferred a settlement.

BY an order of two justices, *Joseph Ashton*, *Ann* his wife, and their three children, were removed from the township of *Sturton-by-Stow* to the parish of *Stow*, both in the county of *Lincoln*; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:

Three weeks after *May-day* 1820, the pauper took a house and land in the parish of *Stow*, at the annual rent of 15*l.*, for one year, from the preceding *May-day*, to *May-day* 1821; and at *May-day* 1821, he took the same again at the same rent for the year then ensuing. The pauper resided in the house, and occupied the land from the time he first hired the same, till five weeks after *May-day* 1821, and

paid the whole rent during the time he so occupied the said house and land. The question for the opinion of the Court is, whether the pauper acquired a settlement in *Stow*, by renting a tenement in that parish.

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Balguy, and *Hildyard*, in support of the order of sessions. The only question in this case is, whether the pauper hired and occupied the house in *Stow* during one whole year, within the meaning of the statute 59 *Geo.* 3. c. 50. That statute enacts, that no person shall acquire a settlement by renting a tenement, unless the house or land shall be "bonâ fide hired by such person at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless the house shall be held, and the land occupied, and the rent for the same actually paid, for the term of one whole year at the least, by the person hiring the same." The sessions were of opinion that the requisites of the statute were not satisfied by the facts of this case, and in that opinion they were clearly right. The premises undoubtedly were not hired originally for the term of one whole year, for they were taken at three weeks after *May-day* 1820, to *May-day* 1821, a period clearly less than a year. Neither were they held or occupied, and the rent for the same actually paid, for the term of one whole year; because, though the pauper resided upon them altogether more than 365 days, and paid rent also for more than that period, still he did not reside for the term of any one whole year, separately and independently. In cases of settlement by hiring and service, it certainly has been held with reference to the statutes 3 and 4 *W.* & *M.* c. 11. and 8 and 9 *W.* 3. c. 30., that a partial service in two different years may be connected, so as to make up one year's service; but the Courts have always yielded reluctantly to that construction of those statutes, and at any rate it would be impossible to extend it to the 59 *G.* 3. c. 50. In *Rex* v. *Aynhoe* (a) the Court expressed their regret that the doctrine of connected services had ever been established.

(a) 2 Bott, 253.

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In *Rex* v. *Sutton* (a), Lord *Kenyon* with the same feeling observed, "it has now been too long settled to be recalled." In *Rex* v. *Over Norton* (b), *Grose*, J., delivering the judgment of the Court, said, "whatever the decisions might originally have been upon the construction of the statute, the rule of law is now inveterate." In *Rex* v. *Fifehead Magdalen* (c), *Lee*, C. J. said, "I remember the resolution was first come to in Lord Chief Justice *Parker's* time, that a hiring for a year, and a service for a year, were sufficient to gain a settlement, though all the service should not be under the same contract, and that Sir *Thomas Powys*, who was just come into Court, very much boggled at it." In *Rex* v. *Fillongley* (d) Lord *Ellenborough* said, "if the statutes are to be strained in any respect, it seems to me, that the mind revolts much more from coupling a previous service with a subsequent hiring for a year, than from the conclusion to be drawn in this case. If it were now for the first time under our consideration, I should be disposed to pronounce a different judgment:" and *Bayley*, J. said, "I am of the same opinion, upon the ground of the authorities alone." In *Rex* v. *Turvey* (e) *Abbott*, C. J. said, "it has been decided in this Court, that where there has been a hiring for a year, and a service for a year, although that service has not been under one hiring, the servant gains a settlement; but I hope no rash genius will ever carry the matter farther." All these cases shew that the liberal, or rather fanciful, mode of construction of certain statutes has already been carried too far, and are authorities for saying that the statute now under consideration ought to be construed strictly. Then what does the statute require, and how is it to be construed? The first requisition is, that the tenement shall be rented for a year. Now, there, the statute must mean, either the same year, or any year. If it means any year, the years of hiring and of occupation may be totally disconnected, and indefinitely distant; so that the

(a) 1 East, 656. (b) 15 East, 3[illegible]7. (c) 2 Bott, 256.
(d) 1 B. & A. 319. (e) 2 B. & A. 250.

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hiring may be for the year 1820, and the occupation may be for the year 1830, which would be absurd; for in such a case, no good end could be answered by the hiring for a year, and that part of the statute would become a dead letter. The second requisition is, that the tenement shall be occupied for a year. Now, before the 59 *G.* 3. c. 50. passed, there was nothing in the law of settlement requiring that the tenement should be *hired* at all, nor was there any thing that made it necessary that it should be *occupied* for more than forty days. And, where a new statute, introductory of new conditions, fixes on one period to apply to all those conditions, using words which may mean the same identical period, or, may mean a similar period, it is reasonable to infer, that the former was meant and not the latter, because no good reason can be suggested for the latter being meant; whereas strong and obvious reasons may be assigned for meaning the former, namely, simplicity and the prevention of disputes, which are the reasons pointed out in the preamble of the act. Upon these grounds, there was not, in this case, a hiring, or an occupation of a tenement for one whole year, within the meaning of the statute, and consequently the pauper acquired no settlement in the parish of *Stow*, and the order of sessions quashing the order of removal thither, must be confirmed.

N. R. Clarke and *Amos*, contrà. The occupation is to be "for the *term* of one whole year at the least." The words "at the least" added in this part of the clause, and omitted in the former, shew that, with respect to the occupation, *any* year will do, that is, any period, however constituted, equalling a year in length. The word "term" is not there used in its legal sense; it means only *period*: for else a hiring for seven or fourteen years would not be a hiring for the term of one year, and would not confer a settlement, which would be manifestly and grossly absurd. The pauper clearly hired and occupied these premises, for a year, within the meaning of the act of parliament. It was decided

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in *Rex* v. *North Collingham* (*a*), that a tenement, within the meaning of the statute, may consist of house and land taken at different times; and by analogy to that decision, it seems plain, that it may also be hired and occupied at different times, or may be occupied in two different years, so as to make up one year's occupation. If the legislature had meant that the hiring and the occupation should be for one and the same identical year only, they would, in the latter part of the clause, have said "such," or, "the said term," which would have been shorter and more plain than the present reading, and would at once have identified the two periods as being in truth but one; and their omitting so to do, is conclusive to shew that they had no such meaning. Upon this simple and well warranted construction of the statute, it is clear that the sessions have mistaken the law, and that their order must be quashed.

Abbott, C. J.—I am of opinion that, in this case, the sessions have mistaken the law. It seems to me that the act of parliament requires no more than what has been complied with by this pauper, namely, a hiring for a year at a rent of not less than 10*l*., and an occupation and payment of rent for a year also. It has been contended, that the hiring and the occupation must be for and in respect of one and the same identical year. If such had been the intention of the legislature, it would have been extremely easy to have expressed it; the introduction of "such," or, "the said," before the word "term" in the latter part of the clause, would at once have expressed that intention, would have shortened and simplified the sentence, and would have made doubt or difference of opinion upon the construction of the clause impossible. They have not, however, expressed that intention, nor do I see any thing from which we can infer that they felt it; indeed the inference is rather the other way, because, if they had meant to convey such an intention, it was easy for them to have done so. I am

(*a*) Ante, vol. ii. 743.

therefore of opinion that the pauper acquired a settlement by renting a tenement in *Stow*.

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Bayley, J.—This was a very proper case for our consideration, and I am glad that it has been brought before us, because, having been fully and ably discussed, it will furnish a rule for the construction of this statute in future cases of a similar kind. As the law stood before the passing of this statute, it is quite clear that enough has been done by this pauper to acquire a settlement in the parish of *Stow*; and what is the law now? It requires that there shall be a hiring for a year at an annual rent of not less than 10*l*. and an occupation and payment of that rent for a year, all by the same person. All these requisites have, in my opinion, been complied with in the present case. *Rex* v. *North Collingham* decided that a tenement may consist of a house and land hired at different times; and if the tenement need not be one tenement, hired at one and the same time, I am at a loss to see why the year of hiring and the year of occupation must be one and the same year, or why the occupation must be restricted to one identical term of one year. I think the act has been complied with in this case in the terms of it, and that it would be perverting the object of the legislature if we were to hold that a settlement had not been gained: for, as it seems to me, the residence under the second hiring for a year may be coupled with the residence under the first hiring for less than a year, and that a year's occupation so made up, is an occupation for one whole year within the meaning of the statute.

Holroyd, J.—This is a restrictive act, and must, therefore, be construed strictly and literally. If it were not so, still its provisions have, in my opinion, been literally complied with in this case. If so, we are bound to hold this a good settlement within the statute, unless we see clearly that the object of the legislature was to express a different meaning from that which their words imply. I, for one,

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cannot see any such thing; and indeed if the construction contended for to-day is the right one, why did not the legislature use the simple word "such," or "said," and thus express their meaning beyond the power of doubt? But instead of that, the two sentences applying, the one to the hiring, and the other to the occupation, are studiously kept apart, and are as studiously couched in different language. The words of the statute regulating settlements by hiring and service are much stronger than the language of this act, for that provides that the party shall continue "*in the same service*" for a year; and yet it is now settled law that the year's service may be made up of two distinct services, under two distinct hirings. I am of opinion that the act has been complied with, and that this was an occupation for a year within the intent and meaning of the legislature.

Littledale, J.—According to the strict and literal import of the words of this act, I concur in thinking that a settlement has been gained. With respect to the intent and meaning of the legislature, I entertain some doubt; but, in an act like this, we cannot travel out of the words.

Order of sessions quashed.

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The King *v.* The Inhabitants of Findon.

The residence of forty days under a contract for hiring and service, must be within the compass of a single year, in order to acquire a settlement, but it seems that the year is not to be computed from the day on which the service ends. Therefore, where a servant had been hired, and served his master for several successive years, and being hired again on the 2d *November*, 1811, resided with him in *O.* until the 14th *April*, 1812, and then travelled about with him until the year was out, when the contract was again renewed, and he went with his master to *F.* where he remained forty days, and then returned to *O.* again, where he remained thirty-eight days, and in a month afterwards they mutually parted before the year was out:—*Held*, that the servant's settlement was in *O.* and not in *F.*

By an order of two justices, *William Steff*, his wife and three children, were removed from *Bedgrave* in the county of *Suffolk*, to *Findon* in the county of *Sussex*. On appeal the sessions confirmed the order, subject to the opinion of this Court upon the following case:

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The pauper, *William Steff*, was hired by the Rev. *James Ventris*, on the 2d *November*, 1807, for a year, and served the whole of that period, and afterwards continued in Mr. *Ventris's* service, under successive yearly hirings, until the 2d *November*, 1811, when the pauper was again hired by Mr. *Ventris* for another year. The pauper served his master at the parish of *St. Peters in the East*, in the city of *Oxford*, from the said 2d *November*, 1811, until the 14th *April*, 1812. He then accompanied him to several other places until the 2d *November*, 1812, when he was again hired by Mr. *Ventris* for another year, and he travelled about with his master until the 20th *December*, 1812, on which day they arrived at *Findon* in *Sussex* (the appellant parish), where they continued more than 40 days, and afterwards he accompanied his master to the said parish of *St. Peters in the East*, in the said city of *Oxford*, where they continued up to the 2d *April*, 1813, a space of 38 days, and on the 2d *April*, 1813, left *Oxford* for *Beeding*, where they continued until the 2d *May* following, 30 days, when they parted by mutual consent. The question for the opinion of the Court is, whether the pauper was settled at *Findon*, or at *St. Peters in the East*, in the city of *Oxford*.

Nolan, and *B. Andrews*, in support of the order of sessions. The pauper's last legal settlement was at *Findon* and not in *Oxford*. In order to make out that the pauper was settled in *Oxford*, it must be shewn on the other side, that there was a forty days residence in that city within the compass of one whole year. The question for the decision of the Court is, in which parish the pauper gained a settlement under the *last* year's hiring and service. The last year's hiring was from the 2d *November*, 1812, until the 2d *November*, 1813. During that year the pauper resided in *Findon* forty days, and but thirty-eight in *Oxford*. So that it is clear that the settlement must be gained in *Findon*, unless it can be said that the service and residence in *Oxford* in that year can be connected with the service and

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residence there during the preceding year, which cannot be made out, either upon principle or authorities. There is no case which has decided upon the doctrine of connected hirings and services, that you can go out of the last year's service, in order to connect it with a preceding year's service. The forty days to confer a settlement must be within the compass of one whole year, and that the last year. This case comes within the principle of *Rex* v. *Denham* (*a*). That case arose upon a removal from *B.* to *D.* and the question was upon the residence necessary to confer a settlement by hiring and service; whether it was necessary there should be forty days' residence within the compass of a year, or, whether, if the service were for several years uninterruptedly, a residence of forty days within those several years would be sufficient. The facts were these; the pauper was hired for a year to *G. S.* and served that year, at the expiration of which he was hired to him for another year, and served half of it; and during that year and a half he was resident in *B.* for forty days, but he did not reside in *B.* for forty days, either within the first year, or within the half year, nor (as was admitted) within any one period of a year whilst he continued with *S.* The sessions were of opinion that this reisdence was not sufficient, and the Court thought their opinion right. Now here there was no residence for forty days in *Oxford* within the last year of the service, consequently no settlement was gained there.

Courthope, *Storks* and *Dover*, contrà, were stopped by the Court.

Abbott, C. J.—I think the last legal settlement of the pauper was not at *Findon*, but at *Oxford*. It is quite clear that, but for the residence for forty days in *Findon*, the pauper would be settled in *Oxford* in the month of *April*, 1813; but, it is said, that the settlement must revert

(*a*) 1 M. and S. 221. Vide *Rex* v. *Apethorpe*, ante, vol. iv. 487.

to *Findon*, not because that is a new or subsequent settlement, but because the pauper did not sleep at *Oxford* forty nights within the compass of a whole year preceding the termination of his service. I however think, that the last residence for thirty-eight days and his former residence may be coupled, and being within the compass of twelve months, that is sufficient. I know of no decision which has said that the forty days must come within the compass of the last year of the service. Certainly *Rex* v. *Denham* does not lay down any such rule.

Bayley, J.—The case of *Rex* v. *Denham* has decided that the residence for forty days must be within the compass of a single year; but subsequently to that case it is no where laid down that the single year is to be computed from the day on which the service ends. In this case, when the pauper had come to *Oxford* in the last year of his service, and had slept there one night, it is clear that he became settled there, for his sleeping there connected itself with the previous settlement which he had acquired in the former year. That subsequent sleeping in *Oxford* superseded the settlement which he had in the mean time acquired in *Findon*, and set up his *Oxford* settlement. These shifting settlements vary from time to time according to the last night where the pauper sleeps, under such circumstances as will enable him to connect that night with any thirty-nine previous nights. Here there having been a settlement previously acquired by the pauper in *Oxford*, the settlement subsequently gained in *Findon* is superseded, by the sleeping at *Oxford*. I therefore think that the sessions came to an erroneous conclusion in deciding that the pauper's settlement was in *Findon*.

Holroyd, J. and Littledale, J. concurred.

Order of sessions quashed.

SMITH v. DE WITTS.

The acceptor of an accommodation bill having delivered it to *A.* for a special purpose, and the latter, without performing his trust, having quitted the country after committing an act of bankruptcy, was pursued by a creditor, who obtained the bill from him in ignorance of his bankruptcy and of the circumstances under which the bill was accepted: —Held, that the acceptor was not liable upon the bill at the suit of the creditor who had so possessed himself of it.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange. Plea, non assumpsit. At the trial before *Abbott*, C. J. at the *Middlesex* sittings after last term, after the plaintiff had proved the usual primâ facie case, the defence set up was, first, that the defendant had accepted the bill without consideration, and second, that it had been deposited by the defendant in the hands of a person named *Crozar* for the defendant's personal benefit, but had wrongfully been indorsed to the plaintiff. The facts proved in evidence for the defendant were these:—The defendant had placed the bill in the hands of *Crozar* for the purpose of getting it discounted and delivering the money over to him, *De Witts*. *Crozar* had become indebted to the plaintiff for goods sold and delivered, and after becoming bankrupt went abroad with the bill in question in his possession. The plaintiff, who was ignorant of the fact of *Crozar* having committed an act of bankruptcy, followed him to *Paris* in order to obtain payment of the goods which he had sold, and there obtained from him the bill in question in satisfaction of the debt. Under these circumstances the Lord Chief Justice was of opinion that the plaintiff had no title to sue upon the bill. His lordship said that if the plaintiff had sold *Crozar* the goods upon the credit of the bill it would have made a difference and would have entitled him to recover; but inasmuch as the goods had been originally furnished to *Crozar* upon his own personal credit, the action must fail, it appearing in evidence that the bill had been given to the latter not for his own benefit, but for the benefit of the defendant from whom he received it. The plaintiff was therefore nonsuited.

F. Pollock now moved for a rule to shew cause why a new trial should not be granted on the ground that the learned judge had erroneously ruled the point at Nisi Prius.

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He contended that if the plaintiff could not maintain this action it would be carrying the doctrine of *Gill* v. *Cubitt*(a) to an unreasonable extent, and to an extent highly prejudicial to the interests of commerce. He insisted that the plaintiff must be considered as a bonâ fide holder for valuable consideration, inasmuch as he received it in payment of a debt justly due and owing to him, and therefore whether the acceptance was, merely for accommodation, fraudulently paid away, or even stolen by *Crozar*, could make no difference as to his legal title to sue the acceptor.

ABBOTT, C. J.—The facts of this case lie in a very narrow compass. It must be admitted that the bill was accepted by the defendant without value. *Crozar* had it at one time from the defendant with directions to pay it over to a third person for the use of the latter. He contrives to get it back again into his own hands and he runs away from this country in debt. He is pursued by the plaintiff to whom he owes money. The plaintiff finds him out in *Paris* and gets from him all the securities he can, and among others this bill. It cannot be denied that if the bill was accepted for value the plaintiff could never have recovered upon it, because *Crozar* being at that time a bankrupt it would have passed to his assignees. Can it be said that this bill, which is of no value inasmuch as it passed from the defendant without consideration, and he being unlawfully deprived of it, the plaintiff has a right to sue upon it and place himself in a better situation than the man of whom he received it? It appears to me that it would be contrary to the first principles of natural justice to say that this plaintiff is a bonâ fide holder for value.

HOLROYD, J.(b).—I agree that if this bill had been delivered to a bonâ fide holder for valuable consideration and a person ignorant of the circumstances under which it had been obtained by *Crozar*, he might sue the acceptor not-

(a) Ante, vol. v. 324. (b) *Bayley*, J. was absent.

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withstanding any want of consideration received by him. But the argument goes a great deal farther, for it assumes that *Crozar* was not a bankrupt at the time plaintiff received the bill. Now at that time *Crozar*, assuming that he had possessed himself of the bill rightfully, had no authority to transfer a right to the plaintiff by indorsement. The plaintiff cannot be in a better situation than the person from whom he derived title. Assuming that the assignees might have recovered it, it is clear that the plaintiff had no title, because at that time the property in the bill, if *Crozar* had any, vested in the assignees.

LITTLEDALE, J. concurred.

Rule refused.

LAMBERT v. KNOTT, and three others.

By a local act for the government of the poor of the parish of *G.* the churchwardens and overseers, and nine guardians and directors, or any five or more of them, were empowered to contract for the supply of the poor with provisions, and the parochial funds were directed to be paid into the hands of a treasurer, who was to apply the money under the orders of the governors and directors. Where the plaintiff contracted with the governors and directors for supplying the poor-house with goods, and acted under the orders of the churchwardens and overseers:—Held, that the latter were personally liable, and that the plaintiff was not bound to join the governors and directors in the action.

ASSUMPSIT for goods supplied to the poor in the workhouse of *St. Nicholas, Deptford*, under a contract entered into by the plaintiff with the governors and directors of the poor of the parish. Plea, the general issue. At the trial before *Alexander*, C. B. at the last assizes for the county of *Kent*, it appeared that the defendants were the four overseers of the parish of *St. Nicholas*. By a local act of parliament, 27 *Geo.* 2. the affairs of that and the adjoining parish of *St. Paul* are placed under the management of nine persons, by the title of "governors and directors," who are annually chosen at a public meeting of the churchwardens and parishioners. Power is thereby given to the churchwardens and overseers, together with the governors and directors, or any five or more of them, to contract for the supply of provisions, &c. for the maintenance of the poor. The money collected by the poor's rates is by the same statute directed to be paid into the hands of a treasurer ap-

pointed under the provisions of the act, who disburses the same under the orders of the governors and directors or any five or more of them. The contract in question was entered into by the plaintiff at a meeting of the governors and directors at which all the defendants were not present, but it appeared in evidence that after the contract was signed they all concurred in giving the plaintiff orders from time to time for delivering the supplies at the workhouse which were the subject of the present action. Contracts with tradesmen are entered in a book at the vestry meeting, and signed by the party contracting, and in the minutes of the proceedings the names of the parish-officers present are set down. It was objected that the contract having been made with the "governors and guardians," the defendants, as overseers and churchwardens, were not liable, especially as they had no funds in hand applicable to parochial purposes. The Lord Chief Baron refused to nonsuit, but saved the point, and the plaintiff had a verdict, with liberty to the defendants to move to enter a nonsuit.

Marryat now moved accordingly, and renewed the objection taken at the trial.

ABBOTT, C. J.—The single point is, whether these defendants are in effect parties to the contract. If they are, the plaintiff has a right to sue them. He has nothing to do with the means by which they become parties to it. By the act of parliament the churchwardens and overseers, and any five or more of the governors and guardians of the poor, are empowered, at a public meeting to be held for that purpose, to contract with persons who think fit to make tenders for supplying the workhouse with necessaries. This plaintiff, it appears, attends at a meeting held in the vestry. He there finds persons professing to have authority to contract with him for supplying the workhouse. His tender is accepted and the contract is entered into. By the terms of the contract he is bound to supply such articles as the overseers may from time to time think fit to order him to

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deliver at the workhouse during the continuance of his contract. Each of these defendants, who are the overseers, does from time to time give orders, and in consequence of those orders the goods are supplied. I own it does appear to me that looking at the clause in the act of parliament, by virtue of which this contract is entered into, this is a contract by each and every one of the overseers, who appear to have acted as governors and guardians. I admit it would be too much to say that a person who never attended a meeting of the guardians would be personally liable, but these defendants were in the habit of attending the meetings and had the management of the poor by giving orders to the plaintiff. This contract, therefore, is in my opinion personally binding on each and every of the defendants, and it is no objection to the plaintiff's right of recovery that he has not sued the whole of the governors and guardians.

Bayley, J.—Whether all the governors and guardians may be liable over to the defendants is a different question, but it is perfectly clear that each of these four defendants is liable. The act of parliament does not authorize the governors and guardians of themselves to enter into contracts, but it says that the churchwardens and overseers with the governors and guardians, or any five or more of them, may enter into contracts. Here is a contract entered into by the plaintiff, nominally and upon the face of it with the "governors and guardians," but it is in substance with the governors and guardians and the churchwardens and overseers, who are capable of contracting. I therefore think that these defendants are liable upon the principle that they have acted upon and adopted this conduct. It might be a different thing if no one of them had ever acted, but each of these defendants has, from time to time, given directions and has taken care that the contract entered into by the plaintiff should be fulfilled. The case of *Horsley* v. *Bell* (*a*) is similar in principle to the present. There certain commissioners for carrying on a canal navigation employed the

(*a*) 1 Bro. C. C. 101 (n).

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plaintiff to do work from time to time. There was a general fund which the commissioners had the power of collecting, and when collected it was to be paid into the hands of the treasurer. Orders were from time to time given by several of the commissioners, but they had issued more orders than the funds would cover; and the plaintiff sued them to make them liable de bonis propriis, and the Court decided that the plaintiff was not bound to look to the fund, but that he had a right to look to those persons by whom he was employed, and they held that every person concerned in signing an order was, in consequence of his signature, personally liable not merely for what the orders specified, but for the general business which the plaintiff had been performing under the contract. It seems to me that that case is very like the present, and acting upon the principle of it I am of opinion that these defendants, who came in under this contract, acted upon and adopted it, are liable to the consequences.

LITTLEDALE, J. (a).—I am of the same opinion. The plaintiff contracts nominally with the guardians and directors. It might be impossible for him to find out the names of all the persons who were the guardians and directors. He very properly resorts to those persons by whom the orders were given. The defendants must be considered as representing the whole body of persons contracting, they act upon the contract, and though they may not all have signed it, yet they are nevertheless liable by having adopted it.

Rule refused.

(a) *Holroyd*, J. was absent.

The KING v. AMPHLIT.

The copy of a newspaper delivered at the stamp-office under the provisions of the statute 38 *G*. 3. c. 78. is conclusive evidence of publication to sustain an indictment against the proprietor for a libel contained in such copy.

INDICTMENT against the defendant for publishing a libel in a newspaper. Plea, not guilty. At the trial before *Garrow*, B. at the last assizes for the county of *Stafford*,

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the only evidence to prove the publication of the alleged libel was the copy of the newspaper, which the defendant, as proprietor, had deposited at the stamp-office, pursuant to the statute 38 *Geo.* 3. c. 78., and it was contended for the defendant that, unless the prosecutor went farther, this could not be considered as a criminal publication, even supposing it might be deemed as a publication in any sense of the word. The learned judge overruled the objection, and the defendant having been found guilty,

Ludlow now moved for a new trial. Delivering a copy of a newspaper at the stamp-office under the compulsory regulations of the statute cannot be considered as a voluntary publication, so as to bring the defendant within the perils of an indictment for a libel. [*Bayley*, J. Is not that in fact a publication, and would it not be primâ facie evidence that the defendant had distributed many other copies ejusdem generis?] This being a criminal case, strict proof of publication, in the ordinary sense of the word, ought to have been laid before the jury. Non constat but that the copy delivered at the stamp-office was the only copy ever printed. It might be an unique copy, and after the delivery the defendant might have repented that he had printed it, and destroyed the rest of the imprint. Surely the publisher of the libel under such circumstances has a locus penitentiæ. This is not a voluntary publication, but is merely deposited in the stamp-office under the compulsory provisions of an act of parliament, and takes place alio intuitu. It is a known rule of law that the delivery of a libel to a magistrate for the purpose of examination is not a criminal publication. So here, this being a delivery to a public officer, conformably to a municipal regulation, stands upon the same footing.

BAYLEY, J. (a)—I have no doubt whatever that this was such a publication as rendered the defendant liable to an indictment for a libel. If a libel be in fact published, whe-

(a) *Abbott*, C. J. was absent.

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ther it be delivered to one person or to another can make no difference, if that person has an opportunity of reading it. The fact of sending this copy of the newspaper to the distributor of stamps, gave an opportunity not merely to him of reading it, but to every person who had access to the stamp-office also. It seems to me, therefore, that this was a criminal publication. Mr. *Ludlow* says that the defendant was compelled to deliver a copy at the stamp-office, and therefore it cannot be considered as a voluntary publication; but the defendant was not compelled to deliver libellous matter in that copy. I think there is no foundation for this application.

Holroyd, J.—I think the publication proved was unlawful, although the defendant was compelled to send the copy to the stamp-office. Publishing it at all is illegal. If the defendant did not mean to publish it, he was under no obligation of sending a copy to the stamp-office. The fact of sending it there demonstrates that his intention was to publish it. The very object of delivering a copy at the stamp-office is that it may be evidence against the proprietor.

Littledale, J. concurred.

Rule refused.

Ewer *v.* Ambrose and John Baker.

On the trial of a civil cause an examined copy of an answer in chancery is admissible in evidence, to contradict a witness, who swore in opposition to what was stated in the answer, to which he was a party.

ASSUMPSIT by the assignees of a bankrupt for money had and received by the defendants. The defendant, *J. Baker*, suffered judgment to go by default, and *Ambrose* pleaded in abatement that *Samuel Baker* ought to have been joined in the action with him, upon which issue was taken. At the trial before *Gaselee*, J. at the last assizes for the county of *Suffolk*, the plaintiff called, as a witness, *Samuel Baker*, who deposed that he never had been in partnership with the defendant *Ambrose*. In answer to this evidence, and for the purpose of contradicting him,

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the defendant produced an examined copy of an answer to a bill in chancery, sworn to by *S. Baker*, in which he had admitted the partnership. It was contended that the original answer should have been produced, and that a copy was not sufficient. The learned judge, however, received the evidence, and in the result the defendant had a verdict.

Frere, Serjt. now moved for a new trial, and contended that the examined copy was insufficient, and that for the purpose of contradicting the witness, the original answer should have been produced. The sole object of producing the answer, was to prove that the witness was guilty of perjury. In that view, therefore, the case must be considered as a criminal proceeding, and consequently the original answer ought to have been produced. For this he cited *Rex* v. *Morris* (*a*), *Lady Dartmouth* v. *Roberts* (*b*), and *Rex* v. *Benson* (*c*).

Bayley, J. (*d*)—I am of opinion that in this particular case the copy of the answer was properly received in evidence, it being proved that that which purported to be a copy was identified. I take the distinction between a civil and a criminal proceeding, with reference to this rule of evidence, to be this:—In a civil suit, not in any respect partaking of a criminal nature, if it be ascertained by other means that the answer is identified, a copy of it will be sufficient for the purpose of contradicting the witness; but upon an indictment for perjury, or in a case which to a certain degree partakes of a criminal proceeding, such, for instance, as an action on the case for a malicious prosecution, there the original must be produced; but in every other case it is sufficient to produce the examined copy. I do not agree with the argument that this case was in the nature of a criminal proceeding, although it may be the foundation of a prosecution against the party hereafter. This was merely an

(*a*) 2 Burr. 1189. (*b*) 16 East, 334. (*c*) 2 Campb. 508.

(*d*) *Abbott*, C. J. was absent.

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action to ascertain how the civil rights of the parties stood, and it does not follow that, because *Samuel Baker* swore at one time that he was a partner with *Ambrose*, and swore at a trial of this cause that he was not a partner, he would be indictable for perjury, for he may be able to give a very satisfactory explanation of his conduct.

Holroyd, J.—I am also of opinion that the examined copy of the answer was admissible for the purpose for which it was produced. It was not given in evidence to fix upon the witness any penalty, or for the purpose of affecting his property; nor would the present proceeding, upon the admission of such evidence, be the foundation for any criminal proceeding against him. It might go to affect his character, but that is no reason for taking the case out of the general rule where the identity of the person and the answer is ascertained. I think this case falls within the rule where an examined copy of an instrument is sufficient, without producing the original (*a*).

The rule was refused on this ground, but a rule nisi was granted on the ground that the verdict was against evidence.

(*a*) *Littledale*, J. was absent.

Crozer v. Pilling and Moore, Gent. one &c.

Where a defendant, on being taken in execution under a writ of ca. sa., tendered the debt and costs to the plaintiff's attorney, and required him to sign his discharge, which he refused to do, until he had paid an independent collateral demand for costs:—Held, that the plaintiff and his attorney were liable to an action on the case for such refusal.

Case. The first count of the declaration stated that in *Michaelmas* Term, 3 *Geo.* 4. defendant had recovered a judgment for 54*l.* 19*s.*, and for the obtaining satisfaction of a certain residue of the damages, (part having before been satisfied,) sued out a capias ad satisfaciendum, indorsed to levy 32*l.* besides poundage; that the said writ was delivered

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to the sheriff so indorsed to be executed; that the sheriff afterwards arrested the plaintiff, and detained and had him in custody under the writ; and plaintiff, being in custody as aforesaid, afterwards, to wit, on &c. at &c. tendered and offered to pay to the defendant *Pilling*, by the hands of the defendant *Moore*, as his attorney, a large sum of money, to wit, the sum of 34*l.* 13*s.* in full satisfaction and discharge of the damages, costs and charges so adjudged to the defendant *Pilling*, being the sum indorsed on the writ, together with poundage and lawful expenses, and being the whole amount lawfully due or demandable of and from the plaintiff to the defendant *Pilling*, under the writ, and demanded of defendant *Moore*, as such attorney, to receive the same in full discharge and satisfaction of the said damages, costs and charges, and sheriff's poundage, and to intrust and inform the said sheriff that the same were satisfied, and to give the said sheriff authority to discharge the plaintiff from his custody under the writ, yet defendant *Moore* wilfully and maliciously intending to oppress, harass and injure the plaintiff, and to cause him to be longer imprisoned and detained by the sheriff under the writ, without any reasonable cause whatever, wilfully and maliciously refused to accept the money tendered in discharge of the damages, costs, &c. and did not nor would instruct the sheriff that defendant *Pilling* was satisfied of his damages, &c., nor give authority to the sheriff to release the plaintiff out of his custody, under the writ aforesaid, whereby, and by reason of the conduct of the defendants in that behalf, plaintiff was detained in custody under the writ for a long space of time, to wit, &c. The declaration contained other counts, averring the tender of the debt and costs to have been made to *Pilling* by the hands of *Moore*, and a refusal by both defendants to accept the money, or to instruct the sheriff to discharge the plaintiff. Plea, not guilty, and issue thereon. At the trial before *Bayley*, J. at the last *Lent* assizes for the county of *York*, it appeared that the plaintiff had been arrested at the suit of the defendant *Pilling*, on a writ of capias ad satis-

faciendum on the 28th of *November*, 1822. After being in custody for some time, he gave notice to *Pilling* and his other creditors of his intention to take the benefit of the Insolvent Debtors Act, and on the hearing of his petition, he was opposed by *Pilling* on the ground of his having omitted to account, in his schedule, for certain property which he possessed, and on that ground he was remanded. In the month of *February*, 1824, the plaintiff's attorney called upon the defendant *Moore*, as *Pilling's* attorney, and tendered him 34*l.* 13*s.* the amount of the debt and costs, and required him to sign a paper addressed to the sheriff in the following terms:—"I hereby authorize you to discharge the defendant from all suits and claims and causes of action, he having paid the debt and costs in this suit." The defendant *Moore* said he would sign nothing, but added, "If *Crozer* will pay the costs which my client has incurred in opposing his discharge under the Insolvent Debtors Act, I will sign the paper for him." On a subsequent occasion a similar application was made to *Pilling* himself, but he said he should leave the matter entirely to *Moore*, his attorney. Four objections were made to the plaintiff's right of recovering; first, that this being a joint action, it could not be supported by proof of the fact of one of the defendants having refused to receive the debt and costs and sign the plaintiff's release; second, that the plaintiff in an action is not bound by law, and has indeed no authority, to discharge a defendant taken in execution, upon a tender of the debt and costs, for it can only be done by an order of the Court from which the writ issued, and, consequently, that even if the defendants had accepted the debt and costs, and signed an authority to the sheriff to discharge *Crozer*, the sheriff would not have been justified in acting upon it; third, that the tender, in order to be available, ought to have been made to the defendant *Pilling*, and not to his attorney; and, fourth, that there being no evidence of malice, which was the gist of the action, there was no case to go to the jury. Upon the first point the learned judge was of opinion, that

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as *Pilling* had said he should leave the matter entirely to his attorney, he was bound by what his attorney did, but, at all events, though the action was joint, yet this being a declaration in tort, the defendants were severally liable. Upon the second point he was of opinion that *Pilling*, or his attorney, was bound to accept the debt and costs, and give an authority to the sheriff to discharge the plaintiff. As to the third point, he was of opinion that the attorney on the record was the proper person to whom payment ought to have been made; and, fourthly, he was of opinion, that as there was no foundation for refusing the plaintiff's discharge, the refusal must be taken to be wrongful, and it was for the jury to determine whether it was not done maliciously. The jury, under the learned judge's directions, found their verdict for the plaintiff, damages 50*l.*, but liberty was given to the defendant to move to enter a nonsuit.

F. Pollock now moved accordingly. The first question is, whether, assuming such an action as the present can be maintained at all, it must not be shewn that the debt and costs were tendered to *Pilling* himself, and not to his attorney on the record. [*Abbott*, C. J. There is no doubt whatever that the attorney on the record is the proper person to receive the debt and costs, and therefore there is no objection on that ground.] Then, secondly, the question is, whether such an action can be maintained under any circumstances. In principle it is perfectly novel, and wholly without precedent. When a defendant is taken in execution under a capias ad satisfaciendum, he has no right to call upon the plaintiff to interfere in any way for the purpose of directing his discharge, nor has the plaintiff any authority to interfere in the matter. All the defendant can do is to apply to the proper authorities to obtain his discharge according to the usual course and practice. [*Abbott*, C. J. In what way does the law entitle a defendant to obtain his discharge when he is ready to pay debt and costs?] By applying to the Court out of which the writ issues, to be discharged upon

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paying the debt and costs, in term time, or to one of the judges at chambers out of term. [*Bayley*, J. But suppose the judges are all out of town on circuit, is the man to remain in custody in the mean time?] The sheriff acts under the authority of a writ founded on a judgment of a court of law, and he is not bound to regard the authority of the parties to the suit; he is entitled to have the authority of the Court out of which the writ issues before he discharges his prisoner. [*Bayley*, J. There are many cases which say that the sheriff is not entitled to receive the debt and costs, and that the money must be paid to the plaintiff himself or to his attorney. *Abbott*, C. J. It is clear that the sheriff cannot take the money, and it is equally clear that it is the duty of the plaintiff's attorney to take it, and give the man his discharge; and can it be contended that if the man is wilfully kept in custody, he shall have no remedy? In the absence of some express authority to the contrary, I shall be slow in coming to such a conclusion.] The case of *Locker* v. *Morrison* (*a*) is to a certain extent an authority against such an action. The plaintiff there had been taken in execution, and a question arising about some costs in another suit, he tendered the debt and costs for which he was in execution, and the plaintiff's attorney refusing to accept the money and give a discharge, an action was brought for such refusal, and Lord *Ellenborough* held that the plaintiff in an action was not bound to interfere after the case was in the hands of the Court and its officers, but that the defendant must get out of custody in such manner as the law entitles him to get out. [*Bayley*, J. That case may have been decided before *Slackford* v. *Austen* (*b*), which determined that where a defendant is taken in execution upon a ca. sa. payment of the debt and costs to the sheriff does not discharge him, the sheriff not having any right to take the money.] It

(*a*) Not reported; but *Pollock* said he cited it from a note given him by *Wilde*, Serjt. who had been professionally concerned in the cause, which was tried before Lord *Ellenborough*, at *Guildhall*.

(*b*) 14 East, 468.

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by no means follows from that case, that the sheriff has no authority to receive the money provided he takes care that the plaintiff gets it before he lets the defendant out. [*Bayley*, J. That case decides that it would be an escape if the sheriff were to discharge his prisoner, unless he immediately pays the money over to the plaintiff.] The effect of that case is, that it would be no answer to an action against the sheriff for an escape, to say that the defendant had paid him the debt and costs, but it does not decide that the sheriff has no authority to receive the money. Upon looking into the older authorities the principle to be collected from them is, that a defendant taken in execution can only be discharged out of custody by the authority of the Court out of which the process issues. [*Bayley*, J. There are many cases which determine that the sheriff has no right to receive the money. *Slackford* v. *Austen* is a decision in point. In *Taylor* v. *Baker*(a) the Court is reported to have decided that a plea of payment to the marshal is bad, because the marshal had no authority to receive the debt, but only to detain the prisoner in custody until he paid it to the plaintiff. From this it is to be collected that the marshal or sheriff has authority only to detain the defendant in custody until the debt is paid to the plaintiff; and if payment can be made to the *plaintiff* alone, it follows that it is his duty to accept the debt and costs when they are tendered, and give the defendant a discharge.] This is only an inference drawn from that case; but it is no where expressly laid down that it is the duty of the plaintiff to receive it, or that he is bound to receive it except through the officers of the Court from which the process issues. In *Anscomb* v. *Shore*(b) it was held, that an action does not lie for distraining cattle damage feasant and impounding them, instead of accepting a compensation for the damages tendered before the cattle were impounded. In *Burmester* v. *Kilch*(c), the Court refused to permit the defendant to pay into Court the debt

(a) 2 Leo. 203. 3 Keb. 748. 788. S. C. (b) 1 Taunt. 261.
(c) 13 East, 551.

and costs up to a certain day after action brought, on the ground of an offer to pay the debt and costs up to that period without having made a tender *before* action, or obtaining the common rule for staying proceedings on payment of debt and costs up to the time of the application. So in *Scheibel* v. *Fairburn*(a) it was held that an action on the case would not lie for suing out a writ of capias ad respondendum, if he neglected to countermand it after payment of the debt, at least unless malice was averred. In *Com. Dig.* tit. *Execution*, c. 13. it is laid down that "a man in execution shall not be discharged upon affidavit though there be cause, but ought to have a supersedeas or other matter of record." This is really an action of the first impression. No precedent is to be found of ever such an action having been brought with success. If the plaintiff is not bound to receive the debt and costs, then no action can lie against him for refusing so to do. [*Abbott*, C. J. How then is a man to get out of custody?] It cannot be said that this is the only mode. There must be some other legal mode where the party is taken in execution. His discharge must be the act of the Court, upon being satisfied that the debt and costs are paid, and not that of the plaintiff. [*Bayley*, J. Is a man to remain in custody all the long vacation after he has paid the debt and costs, or is ready to pay them?] That is the state of the law.

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ABBOTT, C. J.—I think we ought not to grant a rule to shew cause in this case. The general question is, whether when all that is due upon a judgment is tendered to the plaintiff or his attorney, by the party who is taken in execution under a capias ad satisfaciendum, the plaintiff or his attorney is bound to receive the money and to sign an authority to the sheriff to discharge the defendant out of custody. Supposing that point to be in favour of the present plaintiff, then there is introduced a question peculiar to this case, namely, whether the refusal to sign the authority

(a) 1 B. & P. 388.

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to discharge the plaintiff can be considered unlawful and malicious, the refusal having been given on the ground that another sum for costs, which (I will assume) was unquestionably due, remained unpaid. Now in considering the general question it is very important to have regard to the situation of a person who may happen to be taken in execution under process of the Court. It has been decided by this Court, in *Slackford* v. *Austen*, that the sheriff is not bound to receive the money and give the defendant his discharge, and that if he does receive it, the payment to him is no discharge of the debt as against the plaintiff. Since the decision of that case I believe the practice has uniformly been for the sheriff to desire the money to be paid to the plaintiff, and obtain from him an authority for the defendant's discharge. I can very well understand why a sheriff should think that necessary, for it might frequently happen that the money, after being paid to his bailiff or other officer, and the defendant discharged, might never find its way into the coffer of the sheriff, and he would be liable to the plaintiff. It being established that the sheriff is not bound to receive the money and discharge his prisoner, the question now arises whether the plaintiff, in an action, is bound to receive the debt and costs when tendered to him, and to give an authority to the sheriff to discharge him out of custody. If we we were to decide that a plaintiff is not bound to do that, the consequence of such a decision will be, that if a person had the misfortune to be taken in execution upon a ca. sa. soon after the termination of *Trinity* term, he might remain in custody two or three months, unless one of the judges of the court in which the action is brought happens to be in town; and if we go back to more ancient times, the difficulty of obtaining an order from a judge in vacation was much greater than at present; for, according to the habits which prevailed a century ago, it was almost impossible to find a judge in *London* out of term time. The inconvenience which would ensue, if we held that a judge's order was necessary to discharge the defendant, would be so great,

that we ought not to give such a rule the sanction of our decision, unless we saw that the point was perfectly clear. It is said that if we decide that a plaintiff is bound to receive the debt and costs from a defendant in execution, we shall so decide for the first time. I am not sure that we shall not; but although we may decide it for the first time, yet upon full and mature consideration, I think that is the conclusion to which we ought to come. I am of opinion, therefore, upon the general question, that where a debtor offers to his creditor all that he can recover by virtue of the process under which the debtor is remaining in prison, it is the duty of the creditor in law (and nobody can doubt about his duty on the score of humanity and good conscience) to receive the money, and allow his debtor to go at large. Thus the general question stands upon my view of the subject. Then as to the second question, whether the refusal of the defendants to sign an order for the plaintiff's discharge until he paid some other demand for the costs of opposing his discharge in the Insolvent Debtors Court, can be considered as unlawful and malicious; I confess I am unable to distinguish such a claim from any other collateral demand which a creditor may have against his debtor. It often happens that when a debtor is taken in execution upon a judgment, his creditor has some other claim upon him which is not included in the judgment; but I take it to be perfectly clear that it is not competent to the plaintiff to avail himself of the execution so obtained, and convert it into an instrument of compelling the payment of further demands which are not the subject of legal adjustment. If we were to sanction such a proceeding, an infinity of cases may arise where a creditor may deprive his debtor of his liberty until he submits to his demands whether rightful or wrongful. It appears to me, therefore, that the act of the defendants in refusing to discharge the plaintiff after he had tendered the debt and costs was wrongful, and, in the absence of evidence to the contrary, must be presumed to be wrongful. I think, both upon the general and particular question,

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this action is maintainable, and I am perfectly satisfied with the verdict.

HOLROYD, J.—I agree with my Lord in thinking that the verdict in this case ought not to be disturbed. Looking to the object and form of the writ of capias ad satisfaciendum, and to the authority of the sheriff as far as relates to his want of power in receiving the money from a party in execution, I am of opinion, that a creditor is bound to accept the debt and costs when tendered to him, and to give an authority to the sheriff to discharge the prisoner out of custody. By the form of the writ the sheriff is to take the body of the defendant, and to have him on a particular day when the writ is returnable in order to satisfy the plaintiff his debt and costs. The object of the writ is to obtain satisfaction of the debt and costs recovered, and it never could be the intention of the Court that the party should be kept in custody at the suit of the plaintiff so long as he thought proper. Therefore I think that the object of the writ was attained and its purpose satisfied as soon as the debt and costs were tendered. After that tender the keeping the plaintiff in custody was, in my opinion, an unlawful act, for which the defendants are liable, they being the persons who caused him to be detained in custody after he was ready and willing and offered to pay the money in the mode prescribed by law. It is clear, according to the cases of *Taylor* v. *Baker* and *Slackford* v. *Austen*, that the marshal or the sheriff has no authority to receive the debt and costs, and that payment to him will not operate as a satisfaction to the plaintiff of his debt. If therefore the sheriff, without the authority of the plaintiff in the cause, had discharged his prisoner out of custody he would not have been justified, for he is not bound to take the word of the defendant that he has satisfied the debt or that he has made a tender of it, and if, trusting to his word, the sheriff had discharged him out of custody, and in the result it appeared that the tender had not been duly made, he would have been liable to an

action for an escape. This was expressly decided by *Slackford* v. *Austen*. Before the sheriff discharges a defendant he has a right to know from the plaintiff, for his own security, that the debt has been satisfied, or that the defendant has done all that the law requires of him according to the exigency of the writ. It appears to me, therefore, that the defendants had no right to keep the plaintiff in custody a single moment after he had offered to pay the debt and costs, the object of the writ itself being to enforce such payment. Great injustice and hardship might be done if the law were otherwise. I think that the defendants were bound to discharge the plaintiff out of custody when the debt and costs were tendered, and having refused so to do an action is maintainable. The ground of refusal was not justifiable in point of law, because the defendants had no right to hold him in custody under the execution in order to compel him to pay a collateral demand. Therefore keeping him in custody after he had offered to pay the debt and costs was a wrongful act, for which the law will give him a remedy.

LITTLEDALE, J.—The object of the writ of ca. sa. being to imprison the debtor until he pays the debt and costs, the defendants were bound to accept the money when tendered and give an authority to the sheriff for his discharge. The sheriff cannot discharge a prisoner without an authority from the plaintiff in the cause, inasmuch as he has no right to receive the debt and costs of his prisoner when tendered. Here the defendants having refused to accept the money and to sign the discharge, this action is maintainable. It must be presumed here that the refusal was malicious, inasmuch as the defendants had no right to detain the plaintiff in custody until he satisfied the costs incurred in the Insolvent Debtors Court. The presumption of malice not being rebutted by any circumstances proved on the part of the defendants, I think the jury came to a right conclusion.

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BAYLEY, J.—I thought at the time of the trial that a defendant taken in execution upon a ca. sa. was entitled to obtain his discharge from the defendants as soon as he offered to pay the debt and costs, and that it was not competent for the defendants to force upon him the obligation of incurring the expense and the delay which an application to a judge, even if he could be found in *London*, would of necessity have occasioned. I was aware of the decision, to which I referred in the course of the argument, of *Taylor* v. *Baker*, in which it was held that payment to the marshal would not be a discharge to the party paying, who would still be liable to pay the money over again if the marshal did not pay it to the plaintiff. I was aware also of the case of *Stamford* v. *Davies* (*a*), in which it was held that the payment of the debt and costs to the sheriff would not be a discharge as against the plaintiff, because the sheriff might become insolvent and in no condition to pay the money over to the plaintiff. It was laid down by the Court in *Norton's* case (*b*), that the sheriff had no right to receive the money, but that payment to the plaintiff or to his attorney would be good. Then if the present plaintiff had no right to be discharged on payment of the debt and costs to the sheriff, and it was necessary that the payment should be made to the plaintiff or his attorney, I think these defendants were guilty of a wrongful act in refusing to accept payment when it was offered. For these reasons I thought at the trial that this action was maintainable, and I have heard nothing since sufficient to shake my opinion. I think it would be a case of enormous hardship if, when a defendant was taken in execution, the plaintiff were at liberty to say, "I will not take the debt and costs; I know the sheriff has no right to discharge you without a written authority from me; I will keep you in custody until you can get an order from a judge, and there you shall remain until you are so discharged."

Rule refused.

(*a*) 2 Freem. 482. (*b*) 2 Show.

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The KING *v.* RICHARDSON.

Thursday, May 5.

The Court has no power to award costs to prosecutors by indictment, nor to compel a defendant to go before the master.

THE defendant had been convicted of a nuisance in carrying on a manufactory, prejudicial to the health of the neighbourhood. A considerable expense had been incurred by the prosecutor, and a proposition having been made to the defendant, not to pray the judgment of the Court, on condition that he should pay the costs of the prosecution, and enter into a rule to discontinue the nuisance, which the defendant declined doing, it became a question whether the Court had power to compel the defendant to pay the costs, or order him to go before the master.

After argument, *Gurney* for the prosecution and *Scarlett* for the defendants,

ABBOTT, C. J. said, it has been the practice for the Court in certain cases to suggest to defendants the propriety of going before the master, where there is no desire on the part of the prosecutor to press for judgment, and where the interests of public justice are not compromised by such a course of proceeding; but the Court has no power to compel a defendant to go before the master, nor does the law give costs to prosecutors by indictment; and therefore, in the present case, all that the Court can do is to impose a fine upon the defendant. Persons must not make a profit to themselves by the annoyance of their neighbours. The judgment of the Court is, that the defendant do pay to the king a fine of £200, and be imprisoned until that fine is paid (*a*).

(*a*) See stat. 1 & 2 *G*. 4. c. 41. s. 1. which relates to nuisances by the erection of steam-engines, within the operation of which statute, however, the above case could not be brought.

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Thursday, May 5.

Where an appeal, after hearing at one sessions, was *respited* until the following sessions, in consequence of an equal division of opinion on the bench as to the merits: —Held, that no fresh notice of trial was necessary for the following sessions, although, in practice, the rule is otherwise, as to *respited* appeals.

The KING *v.* The Justices of BUCKINGHAMSHIRE.

UPON an appeal at the last *Michaelmas* sessions for the county of *Bucks*, touching the settlement of *Francis Smith*, his wife and their three children, the justices assembled, being equally divided in opinion as to the settlement of the children, respited the appeal until the *Epiphany* sessions. At those sessions, the order was confirmed, on the ground that there had been no fresh notice of appeal given according to the practice of the Court. Last Term a rule nisi for a mandamus was obtained, commanding the justices to enter continuances and rehear the appeal upon the merits at the ensuing *Easter* sessions, on the ground that no fresh notice was required, inasmuch as the appeal was not respited at the instance of either of the parties, but by the Court, on account of an equal division of opinion on the bench.

Dover now shewed cause, and produced an affidavit stating as a fact that the appeal had been entered as *respited*, and that, by the practice of the *Buckinghamshire* sessions in the case of a respited appeal, a fresh notice for the following sessions is indispensable. There was great good sense in this rule of practice; for in the interval the appellants might alter their mind and not chuse to prosecute their appeal farther, and the respondents could not come prepared unless they had a fresh notice. This was not like an adjourned appeal, where the Court, not being prepared to give judgment, might think proper to direct it to stand over until another session, in which case undoubtedly a fresh notice would not be necessary. But here the appeal was actually entered as respited, and therefore it came within the rule of practice.

Bligh, contrà, was stopped by the Court.

ABBOTT, C. J.—The proceedings in this case were rather

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peculiar. It is more than probable, that when both parties came to the *Epiphany* sessions, they had intended to try the appeal upon the merits, and were prepared accordingly, but for this formal objection. In the case of a respited appeal, at the instance of either of the parties, it is a very reasonable rule of practice that a fresh notice of trial should be given. But here the respite, as it is called, took place in consequence of an equal division in opinion amongst those magistrates who composed the Bench at the *Michaelmas* sessions, and therefore no judgment could be given. The postponement which took place was then rather an adjournment than a respite. It was an adjournment at the instance of, and for the sake of the Court, and not at the instance of the appellants, or for their benefit. It seems to me, therefore, that no fresh notice of trial was necessary, and consequently the appeal ought to be heard again upon the merits as to the settlement of the pauper's children, unless the parties can agree to which parish they belong.

Holroyd, J. and Littledale, J. concurred (*a*).

Rule absolute.

(*a*) *Bayley*, J. was absent.

The King *v.* John North.

Thursday, May 5.

Information on 48 *G.* 3. c. 143. for selling "beer *or* ale" without an excise license, is bad, and a conviction thereon, shewing that the defendant had sold ale only, quashed.

CONVICTION on 48 *Geo.* 3. c. 143. for selling ale without an excise license, which being returned by certiorari was to the following effect:—

County of *Leicester*. Be it remembered that on the 19th day of *June*, in the year of our Lord 1824, at *Loughborough*, in the county of *Leicester*, *T. B.* of &c. officer of excise, personally came before the Rev. *R. H.*, Doctor in Divinity, one of his Majesty's justices of the peace for the said county of *Leicester*, residing near to the place where

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the offence hereinafter mentioned was committed, and as well for our lord the now king as for himself, informed him the said *R. H.* that *John North* of *Wimeswould*, in the said county of *Leicester*, did within three months now last past, to wit, on &c. at &c. *sell beer* OR *ale* by retail to be drunk or consumed in his house or premises, without first taking out an excise license authorizing him so to do, contrary to the form of the statute &c., whereby and by force of the statute in that case made and provided the said *John North* hath forfeited and lost the sum of 50*l.*; whereupon the said *John North*, after being duly summoned to answer the said charge, appeared on &c. at &c. before us the Reverend *T. P.* Doctor in Divinity, and the Reverend *J. D.* clerk, two other of his Majesty's justices of the peace for the said county of *Leicester*, also residing near the place where the offence in the said information mentioned was committed, and the said *John North*, having heard the charge contained in the same information, declared he was not guilty of the said offence, whereupon we the said last mentioned justices did proceed to examine into the truth of the charge contained in the said information, and on &c. at &c. one credible witness, to wit, *J. H.* of &c. upon his oath deposeth and saith, in the presence of the said *John North*, as follows:

That on the 24th day of *May* last he went to the house of the defendant at *Wimeswould* in this county, a retail brewer; that the defendant was not at home when he the witness first went, but the defendant soon came home, and he the witness drank two pints of ale with him the defendant in his house, for which he the witness paid the defendant sixpence. And the said *John North*, being now here called upon by us the said last mentioned justices for his defence, in the premises, produces before us the said last mentioned justices, *S. M.* of &c. as a witness on his behalf, who upon her oath deposeth and saith, as well in the presence of the said *John North*, as the said *T. B.* as follows: That Mrs. *North* came to witness's house, and in consequence of what Mrs. *North* said, the witness went to the

defendant's house to observe what passed, and found a stranger there; that the witness followed the defendant and the man (meaning the said *J. H.*) into every place when the defendant was shewing him his premises and is sure he did not pay for the ale. And the said *S. M.* being cross-examined by the said *T. B.*, says that her husband is a tenant of the defendant, and witness's house is in the same yard with the defendant's; that the doors of the houses of the defendant and her husband are not more than six or seven yards apart, and the defendant's customers call for ale and drink it in her house. And the said *J. H.* being further examined by us the said last mentioned justices, positively denies the truth of Mrs. *M.'s* testimony, and says, that the said Mrs. *M.* was not at the defendant's house at the time he had the said ale, and that he never saw her that day. Therefore it manifestly appearing to us the said last mentioned justices, that he the said *John North* is guilty of the offence charged upon him in the said information, we the said last mentioned justices do hereby convict him of the offence aforesaid, and do declare and adjudge that he the said *John North* hath forfeited the sum of fifty pounds of lawful money of *Great Britain*, for the offence aforesaid. And we the said last-mentioned justices, by virtue of the statutes in that case made and provided, do mitigate and lessen the said sum of 50*l.* so forfeited by the said *John North* to the sum of 25*l.* of lawful money of *Great Britain;* the said sum of 25*l.* to be distributed and paid according to the form of the statute in that case made and provided. Given &c.

F. Pollock now moved to quash this conviction, on the ground that the charge laid in the information being in the alternative, namely, that the defendant did sell "beer *or* ale," it was bad upon the face of it, and could not be helped by the evidence, for that applied to selling ale alone.

The Court stopped him, and called upon

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S. M. Phillips, contrà, who contended that this was an objection not now available, even supposing it to have any weight, for being merely an objection in point of form, it was concluded by the operation of the third section of the statute, which declares, that in all cases where it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, no advantage shall be taken of any defect of form. Here it appeared that the defendant had appeared and pleaded, and had gone into his defence upon the merits, and consequently no advantage could now be taken of the objection.

Bayley, J.—It does not appear to me that this is a mere formal objection; I think it is matter of substance. The information must contain a specific charge, without ambiguity, in order that the defendant may know what he has to answer (*a*). Here the substantial charge, as stated in the information, is that the defendant committed either one offence or another; i. e. that he has sold beer *or* ale without a license. The evidence upon which the magistrates convict, applies to selling ale alone. Now I know of no case in which it has been held that if the charge in the information is informally made for being in the alternative, it can be made good by the evidence. There are many cases in which the Court has quashed a conviction, because the information has been uncertain, although the evidence has been sufficiently explicit. This defendant is called upon to answer an alternative charge, which cannot, I think, be made certain by the evidence. This is not, in my opinion, such a defect in form as is contemplated by the third section of the statute. Convictions upon an act of parliament so penal require a great deal of certainty; and I think there is in this case the greater reason for yielding to this objection, that the statute prescribes a settled form of conviction, which has not been adopted.

(*a*) 2 Stra. 900. See *Rex* v. *Middlehurst*, 1 Burr. 399. 1 Salk. 372. 2 Hawk. P. C. c. 25. s. 59.

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HOLROYD, J.—There is no positive charge alleged against the defendant. It is alleged in the alternative, that he did one thing or another. This is matter of substance, and no intendment can be made to help the objection. In *Rex* v. *Jukes* (*a*), which was a conviction on the statute 36 *Geo.* 3. c. 60. which makes it an offence for any person to expose for sale metal buttons marked with the word *gilt* (the same not being really gilt), *knowing* the same not to be gilt, the conviction charged that the defendant did the act *unlawfully* and *fraudulently contrary to the form of the statute;* but the Court held it bad, inasmuch as it did not expressly allege that the offence was committed *knowingly*; and such defect, it was said, was not aided by a proviso in the statute, "that no conviction for any offence in the act should be set aside for want of form or through the mistake of any circumstance, provided the material facts *alleged* were *proved*," for this requires all material facts to be *alleged*, and *knowledge* is a material fact to constitute such an offence. That case is expressly in point.

LITTLEDALE, J.—This is an objection to the substance of the charge, and therefore I think the conviction is bad.

Conviction quashed (*b*).

(*a*) 8 T. R. 536.

(*b*) See *Dyer*, 363. 1 Stra. 493. and *Ex parte Aldridge*, ante, vol. iv. 83. *Rex* v. *Marsh*, ante. vol. iv. 260. and *Paley on Convictions*, 2d Ed. by Dowling, part 2. c. 1.

The KING v. The INHABITANTS of EAST FARLEIGH.

Saturday, May 7.

Secondary evidence of the contents of an indenture of apprenticeship thirty-seven years old, and supposed to be lost, admissible, if reasonable diligence has been used to obtain the primary evidence. What is reasonable diligence in making search after an old indenture which is functus officio, *Quære.*

BY an order of two justices, *James Wickham*, *Jane* his wife, and their two children were removed from *West Peckham* to *East Farleigh*, both in the county of *Kent*.

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Upon appeal, the sessions confirmed the order, subject to the opinion of this Court on the following case:

On behalf of the respondent parish it was proved, that the pauper, *James Wickham*, had derived a settlement in the appellant parish from his birth therein. On the part of the appellant parish it was proposed to prove, that the pauper, in the year 1788, being then about fourteen years of age, was bound apprentice to *John Standen*, a carpenter of *West Farleigh*, by indenture, for the term of seven years, with the consent of his father, who expressed his belief that he, the pauper, and the master had signed the indentures. Two indentures were executed; one of which was kept by the pauper's father, and the other remained in the possession of the master. Shortly after the execution of the indentures, the pauper's father took that which had been left with him to one *Buckley*, a law-stationer, residing near *Lincoln's Inn*, for the purpose of being enrolled, and the pauper's father has never seen it since. The pauper lived five years with *Standen*, in the parish of *West Farleigh*, when it was agreed between the pauper, his master, his father, and one *Edward Tanner*, that the pauper should be turned over to *Tanner* for the remainder of his time; and in pursuance of the agreement, *Tanner* received from *Standen*, the master, the indenture which had been in his possession. *Tanner* shortly afterwards took the last mentioned indenture either to his solicitors, Messrs. *Russell* and *Townshend*, or to the above-mentioned Mr. *Buckley*, but he could not say positively with which of those persons he had left it, although he rather thought with Mr. *Buckley*. The pauper lived with *Tanner* nine months of the residue of his time in the parish of *Saint Giles, Cripplegate*, and afterwards ran away. Neither of the indentures was produced at the hearing of the appeal; but in order to prove their loss the counsel for the appellant parish called as a witness the widow and administratrix of *Buckley*, who stated that her husband had died about three years before, and that she had carefully examined all his deeds and papers, but had not been able

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to find either of the indentures. They also called Mr. *Russell*, who stated that he had been in partnership with Mr. *Townshend* until 1803, and that he had searched for the indenture which *Tanner* stated he had left either with *Russell* and *Townshend*, or *Buckley*, without finding it. They likewise called Mr. *Cutts*, who stated that he was formerly clerk to Mr. *Humphreys*, (an executor of *Townshend*,) but is now in partnership with him as a solicitor. That he and his partner had many papers of *Townshend's* in their hands, which he, the witness, received from *Townshend's* executors, in a couple of boxes, just after *Townshend's* death, while he, the witness, was clerk to *Humphreys*; that he, the witness, had diligently searched amongst all these papers in order to find the lost indenture, but without success, although in the course of his search he found the indenture of another apprentice, and that although the widow and daughter of *Townshend* were joint executrixes with *Humphreys*, he believed that all his professional papers had come into the hands of *Humphreys*. The appellant's counsel also called *Elizabeth Standen*, who stated that she was the widow and administratrix of *John Standen*, the son of *John Standen*, the master; that she remembered the pauper living with *Standen*, the master, whom she considered an apprentice; that her husband had possessed himself of his father's papers, and that she had taken her husband's, but that they were all burnt. After calling the above mentioned witnesses, the counsel for the appellant parish claimed to be allowed to give parol evidence of the due execution and contents of the indentures, and of the service under them, but the court of quarter-sessions refused to allow them so to do. The question for the opinion of the Court is, whether or not, under the circumstances stated, there was sufficient proof of the loss of the indentures of apprenticeship to warrant the admission of parol evidence of their contents.

Claridge, (with whom was *Bolland*,) in support of the

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order of sessions. The question is whether the justices below have done wrong in rejecting the parol evidence. This is clear, that the parol evidence could not be admitted until the case was ripe for the admission of secondary evidence. Now it could not be considered as ripe for that purpose until the parish of *East Farleigh* had exhausted all the proper means of procuring the primary evidence (*a*). Have they done this? Two indentures had been executed, one of which was kept by the pauper's father, and the other left in possession of the master. The first part had been taken by the father to *Buckley*, a law-stationer, for the purpose of being enrolled. It is stated that the pauper's father had never seen it since; but in order to prove that it had been lost, they called *Buckley's* widow, who proved, that she had carefully examined all her husband's deeds and papers, but had not been able to find the indenture. Probably this would have been sufficient to let in parol evidence if the other part had been sufficiently accounted for; but it is clear that enough had not been done to establish reasonable proof that the second indenture had been lost. The second part is traced to the possession of *Tanner*, the second master, who took it either to his attornies *Russell* and *Townshend*, or to *Buckley* the law-stationer, but he could not say with which he left it. Mrs. *Buckley*, Mr. *Russell*, and Mr. *Cutts* were severally called to prove that this indenture could not be found; but there was one most material witness who might have been examined, namely, Mr. *Humphreys*, the executor of Mr. *Townshend*, with whom, and his partner *Russell*, the master, *Tanner*, was supposed to have left the indenture, and to whose custody many of *Townshend's* papers came. It is clear, therefore, that *Humphreys* should have been called, in order to prove that the indenture was not in his custody. In his absence it was not competent for the appellants to give parol evidence of the contents of the indentures and of the service under them. It does not appear that the boxes searched

(*a*) See *Rex* v. *Stoke Golding*, 1 B. & A. 173.

by Mr. *Cutts* contained all Mr. *Townshend's* papers, and therefore there is another link in the chain wanting. The apprentice himself might have been called to give some explanation of the indentures, for there is a possibility that they might have found their way into his possession. Under these circumstances the sessions did right in confirming the order.

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Berens and *Marsham*, contrà. The question is, whether the appellants have used due diligence in making search for the indentures, in order to entitle them to give parol evidence of the contents. According to the language of Lord *Ellenborough*, C. J. in *Rex* v. *Morton* (*a*), "The making search and using due diligence are terms applicable to some known or probable place, or person, in respect of which diligence may be used." Here the appellants have done every thing that could be reasonably required of them, after a lapse of 36 years, to discover what had become of the indentures. As to the first part, that has been satisfactorily accounted for by the widow, Mrs. *Buckley*. The only difficulty is as to the second. Every person who could give any account respecting it has been called, except Mr. *Humphreys*, but there is no reason for supposing that he knew any thing of it. Mr. *Cutts*, who had been clerk to Mr. *Humphreys* at the time Mr. *Townshend's* papers came into the hands of the latter, proved, that he had diligently searched amongst all those papers in order to find the lost indenture, but without success, although in the course of his search he found the indenture of another apprentice; a circumstance which, at least, shews the diligence of the search. It would have been idle, therefore, to call Mr *Humphreys*, who probably could not have given any evidence stronger than that of Mr. *Cutts*, his present partner. The indenture being functus officio, there could be no motive for keeping it, and therefore there is less reason for requiring a strict search than in the case of a document which, from

(*a*) 4 M. & S. 48.

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its importance, would be likely to be preserved. In *Brewster* v. *Sewell* (*a*), the principle laid down is, that the degree of search necessary to infer a loss depends upon the nature of the document in question, and is to be regulated according to its value and importance. This principle was also adopted in *Freeman* v. *Arkell* (*b*). So the decision in *Rex* v. *St. Mary-le-bone* (*c*), which is strongly in point with the present case, proceeded on the same principle. Here, all reasonable search was made for the best evidence of a document, which, from its nature, was not likely to be preserved, and therefore the sessions were not warranted in rejecting the parol testimony of its contents.

Bayley, J.—I am of opinion that the order of sessions must be quashed. In this case there had been two parts to the indentures, which were executed so long since as 1788. The first part has been satisfactorily accounted for by the evidence of Mrs. *Buckley*, the widow of *Buckley* the law-stationer, with whom the apprentice's father left it for the purpose of being enrolled. She proved that, after diligent search, it was not to be found. The other part was originally in the possession of the second master, who said he had either delivered it to *Buckley*, or to his solicitors, Messrs. *Russell* and *Townshend*. Mrs. *Buckley's* evidence satisfactorily shews that it was not amongst her husband's papers. The question then arises, whether, supposing it had been left with Messrs. *Russell* and *Townshend*, it has been satisfactorily accounted for. Messrs. *Russell* and *Townshend* were in partnership until 1803, and if it was delivered to them, it must have been shortly after *Tanner* the second master received it from *Standen*, which would be some time in 1793. The indenture would expire in 1795; and supposing it to remain in *Russell* and *Townshend's* possession after that, it would be utterly useless and no more than waste parchment. No beneficial object, either to the master or the apprentice, could be gained by preserving it. However,

(*a*) 3 B. & A. 296. (*b*) Ante, vol. iii. 669. (*c*) Ante, vol. iv. 475.

there is a possibility that it was preserved, though it is not easy to divine for what purpose. At the time of the dissolution of the partnership between *Russell* and *Townshend*, the probability is that this, amongst other useless documents, would have been destroyed in the selection of partnership papers. The presumption is, that being an useless instrument it would be destroyed, for no sensible reason can be suggested for its preservation. But assuming it to have been preserved by Mr. *Townshend* on the dissolution of partnership, the question is, whether there has been any essential defect in the search made afterwards. Upon the death of Mr. *Townshend*, it appears that Mr. *Cutts*, who was at that time clerk to Mr. *Humphreys*, the executor of Mr. *Townshend*, received two boxes of papers belonging to the latter, amongst which this indenture was not to be found. It is suggested, that these were not all the papers of which he died possessed. There is certainly a possibility that there were others, but no question was put to Mr. *Cutts* upon the subject. If, however, there were none others, and the probability is that the fact was so, then it would have been useless to call Mr. *Humphreys* to prove the same fact which was established by Mr. *Cutts's* evidence. It seems to me, therefore, that considering the lapse of time which has occurred since the indentures were executed, and that every person has been called, in whose possession they might reasonably be expected to be found, such due diligence had been used to obtain the primary evidence without success, as ought to have let in the secondary evidence.

Littledale, J. concurred (*a*).

Order of sessions quashed.

Abbott, C. J. and *Holroyd*, J. were absent.

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Saturday, May 7.

It is an invariable rule to require four bail in cases of felony.

The KING *v.* SHAW.

THE defendant was brought up from *Winchester* gaol by habeas corpus, in order to be admitted to bail to take his trial at the next assizes for *Hampshire*, on a charge of supposed felony. Notice of four bail had been given to the prosecutor, but two only attended, and there being no opposition to the bail,

Andrews moved that the defendant be admitted to bail in his own recognizances, and delivered to the two sureties who attended, but

ABBOTT, C. J.—In cases of felony there must be four sureties, except where all the parties are before us, and we are satisfied that the case justifies us in taking only two. Here the prosecutor does not appear.

BAYLEY, J.—In *Easter* Term, 1821, there was a similar application, but the Court said that the invariable rule was to require four bail in cases of felony. It was suggested then that there had been a relaxation of the rule in a previous instance, but the Court disapproved of the departure from the general practice.

The two bail in attendance were then taken in 20*l.* each, and the defendant's recognizances in 80*l.*, but he was remanded to *Winchester* gaol, and leave was given to put in two other bail; and upon their entering into recognizances, in 20*l.* each, the defendant was to be discharged; the rule for his discharge to be served on the gaoler.

Nuttall v. Staunton.

A landlord, who permits his tenant to retain possession of *part* of a farm, after the tenancy has expired, may distrain under 8 *Anne*, c. 14. ss. 6 & 7. on that part, within six months after the expiration of the tenancy.

THIS was an action of replevin for taking goods of the plaintiff in certain premises situate at *Staunton Grange*, on the 30th of *December*, 1823. Defendant, in his first avowry, averred that one *J. S.* for a year and a half next before and ending on the 29th of *September*, 1823, held and enjoyed a certain farm, of which the premises mentioned in the declaration were part and parcel, as tenant to the defendant, at the yearly rent of 500*l.* payable on the 29th of *September* and the 25th of *March*, by equal payments, and *J. S.* continued and was in possession of the said premises in which &c. from the said 29th of *September*, 1823, until and at the time when &c. And because 150*l.* parcel of the sum of 250*l.* of the rent aforesaid for half a year ending on the 29th of *September*, 1823, was due and in arrear from *J. S.* to defendant, the residue thereof having been paid, and continued unpaid at the said time when &c. defendant avowed taking the said goods in the said premises in which &c. at the said time when &c. that being within the space of six calendar months next after the 29th of *September*, 1823, and during the continuance of the title and interest of defendant in the said premises in which &c. Second avowry, that *J. S.* for one year and a half next before and ending on the said 29th of *September*, and thence until and at the said time when &c. held the said premises in which &c. as tenant to defendant by virtue of a certain demise to him *J. S.* theretofore made at the yearly rent of 500*l.* and because 150*l.* parcel of 250*l.* of the rent aforesaid, for half a year ending as aforesaid on the 29th of *September*, and thence until and at the said time when &c. was due and in arrear from *J. S.* to defendant the residue having been paid, defendant avowed taking the goods in the said premises in which &c. as a distress. Plaintiff pleaded several pleas in bar, on the first three of which issues were taken. The fourth, which was to the first

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avowry, alleged, that after the 29th of *September*, 1823, and before the said time when &c. to wit on &c. at &c. defendant, with the leave and license of *J. S.* entered into and upon the said farm in the first avowry mentioned, in and upon the possession of *J. S.* and retook possession thereof, and the said *J. S.* from the possession thereof put out and amoved, and kept him so amoved from thence until and after the said time when &c. except as to certain parts, to wit, the premises in which &c. which defendant suffered and permitted *J. S.* to occupy for a certain time not elapsed at the said time when &c. without this that *J. S.* continued and was in possession of the whole of the said farm in manner and form as defendant hath in his said first avowry alleged. The fifth plea alleged, that after the 29th of *September*, 1823, and whilst *J. S.* was in possession of the said farm &c. and before the said time when &c. to wit, on &c. at &c. by a memorandum in writing made between defendant and *J. S.* and signed by them respectively, it was agreed that *J. S.* should from that day give possession of the *Grange farm* to defendant, he, defendant, allowing him the use of the orchard, *Little Red Lands*, and *Home Closes*, to the 25th of *March* then next, for his own cows or sheep, that the said *J. S.* should have the use of the house and stable for his horses till the said 25th of *March*, if convenient to him to do so: that the said *J. S.* should plough for defendant such lands as he might direct, paying him after the rate of 12*s.* 6*d.* per acre for such ploughing, that defendant should send such other teams as he might require to plough and get seed wheat into the ground, and that he should have the use of two rooms for a labourer to superintend and work on the farm, with permission to enter with servants and workmen to repair and work on the said farm; that defendant, in consideration of the above, would forego the next *Lady-day* rent, and all dilapidations on the buildings, and the land and the fences as they were, defendant agreeing to pay all taxes and levies charged or to be charged on the *Grange* farm, from that day to the 25th of *March* then next; that *J. S.*

should deposit 250*l.* being his half-year's rent, due *Michaelmas* then last, or secure it to be paid by instalments, when called upon by defendant; that defendant should have the use of the straw, that had grown on the said farm in the last *summer*, to eat, with his or other cattle, *J. S.* having permission to turn cows into the straw-yard, free of any expense. It was also further agreed, that defendant should receive the *Michaelmas* rent, then due, in the following proportions, viz. 50*l.* *November* 5th, 1823; 50*l.* *November* 20th, 1823; 50*l.* *December* 25th, 1823; 100*l.* *March* 20th, 1824; and plaintiff saith, that in pursuance of said agreement *J. S.* afterwards, and long before the said time when &c. to wit, on the 31st of *October*, 1823, at &c. did give possession of the said farm, being the farm so alleged in the first avowry to have been held as aforesaid, and defendant had and continued to have possession thereof thenceforth, until and after the said time when &c. save and except that during that time the said *J. S.* under and by virtue of the said agreement, had the use of the said orchard &c. for his own cows and sheep, and the use of the said house and stable for his horses, and this plaintiff is ready to verify &c. General demurrer to the fourth plea. Replication to the fifth plea, after protesting that *J. S.* did not deposit 250*l.* for the half-year's rent due at *Michaelmas* then last, averred that *J. S.* did not pay defendant 50*l.*, parcel of the said rent, on the 25th of *December*, 1823, pursuant to the said agreement, but the same continued in arrear and unpaid until and at the same time when &c. Demurrer, assigning for cause that defendant hath, by his replication, attempted to put in issue an immaterial fact, viz. whether *J. S.* did pay to defendant the sum of 50*l.*, parcel of the said rent, on the 25th of *December*, 1823, when such payment on that day in particular was not nor is material; and also that the payment of the said sum of 50*l.* was not nor is a condition precedent. Joinder in demurrer.

Erskine, in support of the demurrer to the fourth plea in

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bar, and of the replication to the fifth plea in bar. The argument in this case arises upon the first avowry. It is clear that before the stat. 8 *Anne*, c. 14. the landlord could not distrain for rent after the tenancy expired, under any circumstances. Then the question is, whether that statute makes any difference as respects the present case. By the 6th section it is enacted, "that it shall be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for years or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined." And the 7th section provides that such distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due." Now it is submitted, upon the construction of this statute, that it is perfectly immaterial whether the tenant held over wrongfully or by the permission and consent of the landlord,—whether it was in point of fact a continuing or an old tenancy, or whether it was in performance of a new contract of tenancy, for the words of the statute are general, that in all cases where the tenant *is in possession* and the *landlord's interest continuing*, the latter may distrain in the same way as if the lease had not been determined. This case is therefore clearly within the statute. The avowry here pursues the form given by 11 *Geo.* 2. c. 19. which only requires that the landlord shall avow that the tenant was in possession as such during the time when the rent became due, and does not make it necessary to shew that he continued in possession up to the time the distress was made. Here the avowry contains all the averments requisite to bring the case within the statute 8 *Anne*, c. 14. namely, the possession of the tenant, and that the distress was made within six months after the determination of the tenancy and during the continuance of the landlord's interest, and that is sufficient.

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Therefore, whether the tenancy continued or not, this mode of avowing is correct, *Stainford* v. *Sinclair* (*a*). With respect to the fourth plea in bar, that is badly pleaded, and affords no answer to the avowry, for it says that at a certain day after the time when the rent became due, and before the time of the distress, *J. S.* the tenant remained in possession by the permission of the landlord. [*Abbott*, C. J. A question may arise whether the statute, 8 *Anne*, c. 14. applies unless the party continues in possession of the *entirety* of the farm.] If this is to be considered as a continuing tenancy up to the time when the distress was put in, it comes within the principle of the case of *Beavan* v. *Delahay* (*b*), which decided that the landlord has a right to distrain where the tenant continues in possession of a part only of the premises demised. Therefore, whether there was a new tenancy continued by a parol agreement, or whether the tenant held over, there is enough on the face of this avowry to support the defendant's case. It will be contended, on the other side, that the fifth plea is an answer to the avowry, but that is not so, for although it sets out at length the agreement between the parties, yet it omits to state that the rent was paid or satisfaction made for it in pursuance of that agreement, which it ought to have done according to the cases of *Lingham* v. *Warren* (*c*) and *Hudd* v. *Ravenor* (*d*), If the defendant be entitled to judgment upon this plea in bar, then the replication does not affect the question, and it is unnecessary to consider it.

Chitty, contrà. It appears from the agreement set out in one of the pleas in bar demurred to, that there was not any continuing tenancy existing at the time of the distress, or that there was any thing like a holding over. By the terms of that agreement it was stipulated that the tenant should give up possession of the "said *Grange* farm," which ex-

(*a*) 8 J. B. Moore. 2 Bing. 193. S. C. (*b*) 1 H. Bl. 5.
(*c*) 4 J. B. Moore, 409. 2 B. & B. 36. S. C.
(*d*) 5 J. B. Moore, 542. 2 B. & B. 662. S. C.

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pressions, though used in the general sense as meaning house and buildings, with lands, &c. are explained by the words following, which clearly shew that *J. S.* had not any exclusive dominion over any particular part of the premises as tenant, much less any part of the premises distrained upon. All that he appeared to have was the liberty of agisting cattle, which could in no sense of the word constitute him a tenant. In order to bring the case within the statute it must be shewn distinctly that the party held, in the character of tenant, a mere limited interest; such as this agreement conveyed not being sufficient for that purpose. But, at all events, that statute cannot be construed to affect any but the immediate tenant, according to the case *ex parte Bennet*(a). Here the plaintiff is a stranger to the tenancy and also to the agreement, and therefore he does not come within the operation of the statute. This also affords a complete answer to the replication to the fifth plea in bar, which alleges that the instalment due at *Christmas*, 1823, was not paid; but it does not aver that it was not secured or deposited according to the agreement. Now this matter must be more particularly within the knowledge of the defendant than of the plaintiff. The defendant should have averred in his pleadings that it was not paid or secured, and not having done so, that is a conclusive objection on the part of the plaintiff, as a stranger to the tenancy.

Erskine, in reply, was stopped by the Court.

ABBOTT, C. J.—The fourth plea raises two questions upon the construction of the statute 8 *Anne*, c. 14. ss. 6 & 7. first, whether in order to enable the landlord to distrain under the statute, the holding over by the tenant must be tortious; and, second, whether it must be a holding over of the entirety of the farm and not of a part. I find nothing in the statute of *Anne* which requires that the holding over shall be tortious, or that there is any thing to confine its

(a) 2 Stra. 787.

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operation to a holding over of the whole farm. The statute being made for the benefit of landlords, as it professes to be, we must not narrow its construction, unless by plain and obvious inference arising from its language we are required so to do. I think we are not, and it seems to me that the fourth plea to the first avowry is bad, inasmuch as it admits that the tenant remained in possession of a part of the premises, which admission brings the landlord's right within the operation of the statute. I also think that the fifth plea is bad for the same reason, without looking to the replication. The fifth plea does not deny that the tenant continued in the possession of the farm, but it sets up an agreement and avers a performance thereof by delivering up possession to the defendant, yet it admits the defendant continued in possession of part of the premises, namely, the orchard, &c. and does not deny that the part of which possession was so retained was the place in which the distress was made. I therefore think that the defendant is entitled to judgment on the fourth and fifth pleas in bar.

BAYLEY, J. (a) and LITTLEDALE, J. were of the same opinion.

Judgment for the defendant.

(a) *Holroyd*, J. was absent

The KING v. The INHABITANTS of CHILLESFORD.

An unemancipated son may acquire a settlement by a bonâ fide contract of hiring and service for a year with his father.

BY an order of two justices, *John Bye*, *Sarah* his wife, and their four children, were removed from the parish of *Blythburgh* to the parish of *Chillesford*, both in the county of *Norfolk*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case:

William Bye, the pauper's father, being a married man, and settled in *Chillesford*, let himself to Mr. *Taylor*, of *Blythburgh*, better than fourteen years ago, as a shepherd;

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he was to have for the first year, forty shillings for wages, ten coombs of wheat and two of barley, produced on the farm, the going of thirty breeding ewes, worth 10*l.* a year, and a cottage in *Blythburgh*, rent free, worth three guineas a year. *W. Bye* continued with Mr. *Taylor* for fourteen years upon the same terms. The ewes were *W. Bye's*, and fed with Mr. *Taylor's* sheep, and went in the morning in the sheep-walk, and in the afternoon on the layers, and in the winter on the turnips, which were not drawn, but a certain portion of the turnip field was hurdled off, and the sheep then fed upon the turnips; but during winter, when from frost or snow it was necessary, they were fed with hay, though for several seasons, the weather being open, there was no occasion to feed them with hay. If *W. Bye* had not had the cottage, he would have had more wages, and it was convenient for him as a shepherd, as it was on the spot.

W. Bye hired every year one or two pages, over whom Mr. *Taylor* had no control, and about nine years ago, when one *Jarvis*, one of the pages, was to leave, *W. Bye*, about a week before old *Midsummer*, agreed with his son, the pauper, who was at that time nineteen years of age, and unemancipated, to serve him for a year, from old *Michaelmas* to old *Michaelmas*, in *Jarvis's* place, at the same wages, 8*l.* a year, which time the pauper served, and slept in *Blythburgh*, being then unmarried, in his father's house.

Marryat and *Dover*, in support of the order of sessions, were directed to confine themselves to the second settlement stated in the case. The question is, whether the pauper gained a settlement by hiring and service with his father, he being at that time unemancipated. There are no cases to be found in which it has been held that a minor can gain a settlement by serving a parent, under a contract, unless the child has previously gained a settlement in its own right, or has become emancipated. There are, indeed, two cases which have decided that the child, after becoming emancipated, may gain a settlement by a bonâ fide service, under a

contract entered into with the parent. Thus, in the case of *Chesham* v. *Missenden* (a), it was held that where a daughter, who had a settlement of her own, hired herself to her father, as a servant, for ten shillings a year, besides what she could gain by her labour, she gained a settlement by such hiring and service. The like principle was laid down in *Rex* v. *Chertsey* (b), where also, the pauper having previously gained a settlement in her own right, by hiring and service, it was held that she was capable of acquiring a settlement by hiring and service with her father. There is, however, no authority to shew that an unemancipated infant is capable of entering into a contract of this nature with his parent. The child is naturally owing service, and being under the will and control of the parent, and if not emancipated or otherwise sui juris, is incapable of entering into a contract of hiring and service with his father. The doctrine laid down by Lord *Ellenborough*, in *Rex* v. *Beaulieu* (c), is extremely applicable to the present case. There it was held that an invalided soldier, who had leave of absence, was incapable of gaining a settlement by hiring and service, not being sui juris to hire himself within the statute 3 *W.* & *M.* c. 11. and Lord *Ellenborough* laid it down, that in order to gain a settlement by hiring within the meaning of that statute, the party must be sui juris, and have the faculty of disposing of his own service. "An effectual hiring," his lordship says, "is where the servant is enabled to give the master a quid pro quo." [*Bayley*, J. The reason given in that case was, that the invalided soldier had entered into a contract for his services as a soldier, which was inconsistent with the relation of a hired servant to another person. In this case the child does not contract for his services with any body but his father.] But here the relation of parent and child is superior to that of master and servant, and the character of servant merges in the higher duty of a son, and consequently an infant unemancipated cannot contract the relation of a hired servant to his own father. [*Bay-*

(a) 2 Bott, 178. (b) 2 T. R. 37. (c) 3 M. & S. 229.

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ley, J. May not the father renounce his parental rights?] The son must be sui juris, and have the power of disposing of his services, which this pauper clearly had not. Here, in the language of Lord *Ellenborough*, is no quid pro quo for wages, for he already owed his services to his father. [*Bayley*, J. Do you mean to argue that if a son is capable of maintaining himself, he has no right to go from under the parental dominion for that purpose, and that the father would have a right to say to him, "You shall not go out to service; you shall stay with me, and I shall have the benefit of your services."] Certainly the argument must go that length. This case is analagous to that of an apprentice, who is incapable of contracting as a servant with another master during the continuance of the indentures. [*Bayley*, J. That case is totally dissimilar.] But still the child must be able to contract the relation of servant to his father, which, if he be an infant and unemancipated, he cannot do, because he is not sui juris. Assuming that such a contract could exist, still the relation of servant would merge in that of son. The father would have power to put an end to the contract at any time, which would not be the case with respect to any other servant. This case must be considered with reference to the peculiar view which the law takes of an unemancipated child. It must be admitted in the case of an apprentice, that during the existence of the indentures he cannot contract the relation of a hired servant, but that is because the relationship of apprentice is superior, and is contracted by deed. By the statute 5 *Eliz.* c. 4. a pauper, although an infant, may be put out apprentice without the consent of the father, or he may bind himself. But for that statute an infant could not bind himself by deed; his indentures would not be binding. [*Abbott*, C. J. They would be voidable, but not void absolutely, because such a relationship is for the benefit of the infant.] In *Gilbert* v. *Fletcher* (*a*) it was resolved that neither at the common law nor by any words of the statute 5 *Eliz.* a covenant or obli-

(*a*) Cro. Car. 179.

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gation of an infant for his apprenticeship shall bind him. An unemancipated child bears the same sort of relation to his father that a wife does to her husband, with reference to the capacity of gaining a settlement by hiring and service. It could not be contended that a wife could gain a settlement by a contract of hiring and service with her husband; and so a son, unemancipated, is equally incapacitated. It has been held that the statute 3 & 4 *W.* & *M.* c. 11. extends only to unemancipated children, and not to those who are separated from the father. Now, if the Court decides that this contract can be entered into, upon the principle that it is for the benefit of the infant, it will defeat the policy of that statute. By the law of nature, duties are imposed upon a parent and child respectively which do not exist in the ordinary relation of master and servant. The child owes a duty to his parent, whom he is bound to serve and obey, and the father is under the obligation of maintaining and instructing him. The father has a control over the son, which is paramount to every other dominion given by law to a master over his servant. If a father goes before a magistrate to complain of his son for misconduct, the magistrate cannot exercise any control over him, because the father himself has a power to punish and chastise him. A father can appoint a guardian for his son in case of death, and that circumstance is sufficient to shew the superior relation which subsists between parent and child compared with that of master and servant. The mischiefs and inconveniences which must result from a decision that an unemancipated infant may contract as a servant with his father would be endless. It would lead to nice and difficult questions in many cases, and would invite a great deal of litigation between parishes. [*Abbott*, C. J. The only question in such cases would be, whether there was a bonâ fide hiring as servant. The same question would arise if this pauper had hired himself to any other person. There would be no practical inconvenience therefore in that point of view.] But still, in the event of a breach of the contract between the parties, it would follow that the son,

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though an infant, might bring an action against his father; an evil state of things which the Court would not be disposed to encourage. [*Abbott*, C. J. Suppose the son in this case had hired himself, and served for a year with a stranger, and had then come back to his father's house, and entered into this contract with his father, could it be said that the son would not gain a settlement under this latter contract?] In that case he would be settled under the contract with his father, because at the time it was entered into, he would have been emancipated, and sui juris. [*Abbott*, C. J. But does emancipation, by first gaining a settlement by hiring and service to a stranger, give a greater power of contracting with the father, than the infant otherwise would have had?] Under the poor laws it is contended it does.

Nolan, contrà. It cannot be denied that a minor may enter into a contract for his own benefit with a stranger. If so, upon what principle may he not do so with his father? Surely there is no disqualifying influence in the sacred ties of affection and of blood. The cases referred to, on the other side, determined that an emancipated child may acquire a settlement by entering into a contract of service with his father. If then the principle be conceded, that such a contract may be entered into by an infant, the fact of his having been previously emancipated can make no sort of difference as to the result. The circumstance of emancipation from the parent's roof, does not destroy those ties of duty and of affection which are assumed to be the disqualifying circumstances in a case like the present. If emancipation be necessary to enable a son to contract with his parent, that doctrine may be carried to a most inconvenient extent. Merely attaining the age of twenty-one years, is not the ground upon which the son's ability or disability to contract with the parent is founded, because it does not necessarily follow, from the fact of the son being of age, that he is emancipated in the eye of the law. Will it then be contended that a son, who has attained

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twenty-one, is incapable of entering into any binding contract with his father, either for service or any other purpose, although he happens not to be emancipated? Such a proposition could not be maintained for a moment. Numberless instances might be put to shew the injustice, cruelty and hardship which might result from such a doctrine. It would utterly incapacitate the father on the one hand from promoting his son's interest, by entering into a contract with him for his benefit, and deprive the son on the other of those advantages which parental kindness or interest might induce the father to bestow upon him. If there was anything inconsistent or repugnant in a contract of hiring and service between parent and child, there might be great difficulty in overcoming the objection, but no such difficulty arises in the present case. It is assumed on the other side, that this case is analogous to that of husband and wife, and consequently as a wife would be incapable of entering into such a contract with her husband, so would the child with his father. But nothing can be more dissimilar than the two cases, because they stand upon a totally different footing. The case also of the soldier does not apply to this, because there the pauper was incapable of gaining a settlement, he not being sui juris at the time of the hiring. Here the infant was capable of entering into a contract for his own benefit, and it matters not that he was unemancipated at the time the contract was entered into. It has been decided that an infant may bind himself apprentice to a third person (*a*), and if so, he may do so to his parent. By parity of reasoning he may also enter into a contract of hiring and service with his father. If the doctrine contended for on the other side is well founded, it would in practice affect the interests and rights of a great number of persons who derived their right of freedom in corporations, as well as many other privileges, from being bound to, and serving their parent. The argument ab inconvenienti can have no

(*a*) See *Newbury* v. *St. Mary, Reading*, 2 Bott, 363; *Rex* v. *Salton*, 1 Id. 613; and *Rex* v. *Great Wigston*, ante, vol. v. 339.

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weight in deciding the present case, because it is equally applicable to other cases of hiring and service, where the question must always be whether the hiring be fraudulent or not, as a question of fact. Here, as the relation of master and servant is not incompatible with that of parent and child, the Court will not be influenced in its decision by any vague notions with respect to the consequences which may result from their determination.

In the following case a similar question being raised, the Court reserved its opinion upon this until they had heard the argument upon that.

The King v. The Inhabitants of Winslow.

An unemancipated son may acquire a settlement by a bonâ fide contract of hiring and service for a year with his father, in a parish where the latter has no settlement, notwithstanding the 3 & 4 *W.* & *M.* c. 11.

ON appeal against an order of two justices for the removal of *Elizabeth*, the wife of *Thomas Lane*, and their two children, from *Winslow*, in the county of *Bucks*, to *Beaulieu*, in the county of *Hants*, the quarter sessions quashed the order, subject to the opinion of this Court on the following case:—

T. Lane, the husband of the pauper, when about fourteen years old, being then unemancipated, was hired by his father, who was a sawyer, residing at *Beaulieu*, but not having a settlement there, to assist him in his work as a sawyer. A contract was, in point of fact, made between them, whereby the son agreed to serve the father for a year at the wages of 2*l.* 10*s.* his board and lodging being also provided by the father. He served this year with his father in *Beaulieu*, and received his wages, and, at the expiration of this contract, served his father for two successive years, under new contracts, at increased wages. The question for the opinion of the Court is, whether under this hiring and service in *Beaulieu*, the pauper's husband gained a settlement.

Scarlett, *Dover*, and *J. B. Monro*, in support of the order of sessions, followed the same course of argument adopted

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in the previous case, but added, that if this particular case was considered with reference to the policy of the law in conferring a settlement by hiring and service, some incongruity would result. By the 3 & 4 *W.* & *M.* c. 11. the power of gaining a settlement by hiring and service is confined to unmarried persons, not having child or children. The object of the legislature was, that a married person or a person having lawful children could not communicate to the children a settlement in the parish, by entering into a contract of hiring and service. This construction has been put upon the statute by a decided case, for it was held in *Rex* v. *Cowhoneyburne* (*a*) that a man may gain a settlement by hiring and service if his children are emancipated at the time from which the parent engages to serve. The object of the statute, therefore, would be completely defeated if it be held that the father can, by making a contract of hiring and service with his children, enable them to gain a settlement in the parish where he resides, though he has himself no settlement there.

Bligh, contrà, was stopped by the Court.

The Court gave judgment in both cases as follows:—

Abbott, C. J.—I am of opinion that in each of these cases the pauper gained a settlement by the hiring and service with his father. It is conceded in argument, that if the pauper had been previously emancipated, (using that word according to the sense in which it is used in settlement law, that is, if before the time in question he had been hired for a year, and served for a year with a stranger, which is one of the instances of emancipation,) he might have gained a settlement by hiring and service for a year with his own father afterwards. But it might also have been conceded that emancipation does not confer any capacity to contract, and the objection here in point of law is, that the son has not

(*a*) 10 East, 88.

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any capacity to contract with his father. It must be admitted that he might have contracted with a stranger without, or, at all events, with his father's permission, to serve as a yearly servant. The contract of an infant, if it is made for his benefit, is not, according to the general principles of law, absolutely void. It may be voidable at the election of the infant himself, but of no other person. In this respect, this case is very distinguishable from a contract of hiring and service by a person who was a soldier at the time of hiring. There the consent of the officer was completely nugatory, because the officer could not consent to the contract. The soldier was not then sui juris, but was under the dominion of the crown, and the crown had a right to avoid the contract at any time; and, therefore, in that case the Court very properly held that the contract was not valid in law. But in this case, as I have already said, the contract is not void, but voidable only. If, therefore, an infant may, with the permission of his father, enter into a contract with a stranger, why may he not do so with his own father? I know of no such incapacity, if the son is capable of serving as a servant, and his father thinks his services worth remuneration. There being nothing, therefore, in the settlement law, that I can find, which declares such a contract with the father to be void, can we say that there is any thing which shall prevent the son from gaining a settlement by such a hiring and service? It is put by Mr. *Scarlett* that if a settlement can be so gained, it may enable a father to confer a settlement on his son in a parish in which perhaps the son could not gain a derivative settlement from his father. But this is not the only case in which a person may derive a settlement from another who has himself no settlement in the parish. Then it is put strongly, and with so much force as to induce me to pause in the conclusion to which my mind was originally prepared to come, that if we decide this to be a settlement, it may lead to much confusion, and to the raising of many questions of a similar nature for the determination of the quarter sessions. I cannot say that such

may not be the case; but, however, when such questions shall be raised, it will be the duty of the quarter sessions to look narrowly into the facts of the case, and see whether there really was any contract of hiring and service. One mode of ascertaining that, will be to inquire whether the father had the power of employing his son as a servant, and whether he had any thing for him to do in that capacity. If the quarter sessions are satisfied that the employment of the son was merely colourable, and that the father had really no necessity for a hired servant, they may reasonably conclude that there was no contract for hiring and service. In the first of the cases at bar, it appears that the son came into the place which had been filled by another person, who had been hired at yearly wages. That is abundant evidence that the father had really occasion for a servant of that description. In the other case the father was a sawyer, and he had almost always occasion for two persons to assist him in his business. Indeed the nature of the trade itself, which requires the concurrence of two persons at least, to carry it on with skill, shews that the father had occasion for a servant, and it is stated as a fact, that for several successive years the pauper had served him at increased wages. For these reasons it appears to me that a settlement was gained by the paupers in both cases.

Bayley, J.—This is the first time that the question has come before the Court, whether an unemancipated son can gain a settlement by hiring and service for a year with his father; but upon full consideration of the case, it appears to me that an unemancipated son is competent to enter into a contract of that description with the father, and that all the legal consequences resulting from such a contract follow from the existence of that contract. It is clear that an infant may bind himself by a contract of hiring and service with a stranger. It may be in general supposed that such a contract is entered into with the consent and concurrence of the father, but there may be instances in which the father

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is not in any respect consenting, and even where a son, against the father's consent, enters into such an engagement, yet still he will gain a settlement, and he may insist upon having his wages paid him, and he may be liable to all the statuteable stipulations and regulations respecting the relation of master and servant. If then an infant may bind himself to a third person by a contract of hiring and service, the question is, whether the relation of parent and child destroys the power of contracting and entering into the obligations which a contract of hiring and service embodies. With respect to emancipated children there are many authorities which say that it does not do so. In the case of a natural child it has been decided that it does not, and so also in the case of a step-child where the mother is living, *Rex* v. *St. Peter's, Dorset* (*a*); and yet if a step-child is capable of contracting with his step-father, some of the mischiefs, at least, will result that are pointed out by the counsel in argument against the settlement. Those inconveniences will equally arise in the case of emancipated as well as unemancipated children. It is suggested that the effect of this decision will be to give rise to a great number of discussions at sessions. But the sessions is the proper tribunal to determine whether there is or is not fraud in the contract. If the father has no occasion for a servant and the employment of the son in that capacity is merely a pretence, the sessions will decide accordingly; but if there is a bonâ fide contract of hiring and service, why may not that contract produce a new relationship and create new rights and obligations between the parties? I see no reason why the father and the son should not be at liberty to enter into a contract of that description. It gives to the father greater control over the son, and certainly a control which may be very beneficial to the latter, who will have the benefit of his father's protection, as well as that salutary restraint which the relation of master gives in the ordinary case of a hired servant. For these reasons it appears to me, that there being

(*a*) Burr. S. C. 513.

no disqualification in the relation of parent and child inconsistent with that of master and servant, a settlement was gained by the pauper in these cases.

Holroyd, J. being obliged to attend chambers, left the Court after having heard the opinion delivered by the Lord Chief Justice.

Littledale, J.—My brother *Holroyd*, who has left the Court, desires me to say that he concurs in the opinion delivered by my Lord Chief Justice. I am also of the same opinion. By law a parent has a right to exact service from his son or daughter, and it is upon this principle that an action per quod servitium amisit, lies at the suit of the father for an injury whereby he is deprived of the services of his child, loss of service being the foundation of the action. In an action for seducing a daughter, the mere circumstance of the daughter living under the parent's roof, and being of capacity to perform actual service, enables the father to maintain the action without proof of an actual hiring, or any actual service being performed. All that the father has to prove is, that the child is of an age capable of performing service, and that is sufficient to entitle him to sustain the action. If then there be a species of service already existing, due from the child to the parent, why may not the obligation to serve be made stronger, by allowing the parent to enter into a contract with his son or daughter that he or she shall serve him for a certain time at stipulated wages, and by that means making the relationship of master and servant, which before existed, still more obligatory? It is admitted that an emancipated child may hire himself to his father; but it is said this may not be done where the child is unemancipated, because the child being already under the control of the parent, and owing him services by the law of nature, he cannot enter into such a contract. But there seems to me to be no reason why a child may not contract with his parent for the performance of other services than those which are due in consequence of the relation of

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parent and child. Surely those duties, which are often imperfect, may be rendered more certain and obligatory by an express contract between the parties. Unquestionably such a contract is highly beneficial to the child, because it superadds the salutary restraint of the master to that of parent, and renders him amenable to the statute of regulations applicable to master and servant. If then, in point of law, such a contract be valid and binding, there seems to be no reason why a settlement should not be gained by a service under it. The statute no where says in express terms, that a settlement shall not be gained, merely because the person hired happens to be the child of the master. Some inconveniences may arise from the decision in this case, but that is no reason why a contrary decision should be pronounced so as to deprive these paupers of a settlement, where there is nothing either at the common law or by the statute of *William*, which makes such a contract void.

Rules absolute for quashing the Orders of Sessions.

Monday, May 16.

A writ of error from an inferior court may be quashed in this Court on motion: but this Court will not quash such a writ on the ground that there were less than fifteen days between the teste and the return.

FORSTER v. LAIDLER (in Error.)

THIS was a writ of Error from the Borough Court of *Berwick-upon-Tweed*.

Alderson having obtained a rule nisi to quash the writ upon the ground of irregularity, there being only twelve days between the teste and the return instead of fifteen,

Wightman now shewed cause. It is by no means indispensable that there should be fifteen days between the teste and the return. A writ of error is not the commencement of a suit (*a*). The teste of the writ of error is the day of

(*a*) *Sed* vide 2 *Tidd*, 6th ed. 1167. where it is said, "A writ of error, like a scire facias, is considered as a new action;" and *Batchelor* v. *Ellis*, 2 T. R. 337. where this Court, as it should seem upon that very principle, decided, that "the defendant in the *original* action need not obtain a judge's order to change his attorney upon bringing a writ of error."

suing it out, 2 *Tidd*, 6th ed. 1170. *Hill* v. *Tebb* (*a*). It will be found upon reference to the master, that the constant practice has long been not to pass over more than one return between the teste and the return, and the compliance with that practice in this case has brought the return within fifteen days from the teste. It is, indeed, laid down in 2 *Tidd*, 6th ed. 1171, that "it is necessary, in all cases, that there should be fifteen days between the teste and the return of a writ of error;" but no authority is cited for the dictum, and the practice is directly against it.

Alderson, contrà, relied upon the rule laid down by Mr. *Tidd*, and contended that even if the practice had of late years been different, no good reason being shewn for the innovation, the Court would not encourage it.

ABBOTT, C. J. (after conferring with the master.)—I am informed that for several years past the practice has been such as is contended for by Mr. *Wightman*; and as the party has, in this particular instance, followed the general course of practice, I think we ought not to intefere to quash the writ.

The other judges concurred.

Rule discharged (*b*).

(*a*) 1 N. R. 298.

(*b*) When this rule was moved for, the Court at first entertained some doubt whether they had authority to quash a writ which issued out of the Court of Chancery; but upon the authority of *Lloyd* v. *Skutt*, 1 Doug. 350. which was then cited, they granted the rule. That was a writ of error to reverse the judgment of this Court, and it was there held, that the writ could not be quashed in this Court, but that the application must be made either to the Court of Chancery from whence it issued, or to the Exchequer Chamber where it was returnable: and upon an application to the Court of Chancery to quash the writ, they refused to entertain the question. It seems, therefore, that if the writ of error in this case had been brought to reverse the judgment of this Court, a motion to quash the writ could not have been entertained by this Court, but that being to reverse the judgment of an inferior court it might.

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An *executory* contract for the sale of a ship is within the 34 *G.* 3. c. 68. s. 15. and is void if not indorsed upon the certificate of the ship's registry.

MORTIMER and others, Assignees of MERRIMAN, a Bankrupt, *v.* FLEMING.

ASSUMPSIT by plaintiffs, as assignees, for money had and received by defendant for the use of the bankrupt before his bankruptcy; for money lent and advanced by the bankrupt to defendant; for wages due from defendant to the bankrupt as master of a ship; and for interest. There were also counts for money had and received by defendant for the use of plaintiffs, as assignees, &c. Plea, the general issue, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Michaelmas* term, the plaintiffs had a verdict, subject to the opinion of the Court upon the following case:—

A commission of bankrupt duly issued against the bankrupt, bearing date 25th *January*, 1820, founded on an act of bankruptcy committed 17th *December*, 1819, under which commission plaintiffs were duly chosen assignees. Defendant was sole owner of the ship *Ganges*, registered in the port of *London*. On the 27th *May*, 1817, defendant and the bankrupt duly executed articles of agreement, reciting that after the arrival of the *Ganges* in the port of *London* from her last voyage, and on her completing such voyage, the bankrupt, who was master of the ship, agreed with defendant for the absolute purchase of the ship and her appurtenants, in the state and condition the same were in on the completion of the said voyage, at the price of 7,350*l.* but that the bankrupt then being unable to pay the whole purchase money, it was further agreed between them, *that the sale and transfer of the ship and her appurtenances to the bankrupt should be deferred until he could and should pay the purchase money* in manner thereinafter mentioned; and that in the mean time, for the benefit and accommodation of the bankrupt, defendant should be and continue interested in and entitled to the ship and her appurtenances as

legal owner thereof, and should also be responsible for her outfit, manning, tackle, apparelling, furnishing, providing, and other supplies, and for all her costs, charges, and expenses, and for the premiums and costs of the insurances on the ship and her freight, so as to enable the ship to proceed on her then intended voyage to *India* and back, under the command of the bankrupt; but, upon his account, nevertheless, and on his entering into and performing the covenants thereinafter contained on the part of him, his heirs, executors, &c. to be performed, in which case he should be entitled to, and receive to his own use, all the gains, profits, and earnings of the ship, for and during her then intended voyage to *India* and back; the bankrupt covenanting to be at the same time responsible for all losses and damages which might arise or result from, or for, or in respect of the ship on her intended voyage and adventure. The articles of agreement then, after reciting the certificate of registry of the ship, contained covenants by the bankrupt to pay defendant all sums of money, costs, charges, and expenses, which, since the completion of the ship's last voyage, had been, or thereafter should be, expended or paid by defendant, or for the payment whereof he might be responsible, in respect of, or for, or on account of the ship, or the outfit, manning and otherwise supplying the same, and the premiums and costs of insurance on the ship and her freight, or otherwise concerning the ship, down to and until such transfer and conveyance as was thereinafter mentioned. There then followed a covenant by the bankrupt to pay all port charges, disbursements, and expenditures requisite to be paid on account of the ship, subsequent to the day of her sailing from *Gravesend* on her intended voyage; and, to save defendant harmless in consequence of his continuing owner for the bankrupt's accommodation, to pay the purchase money in the following manner:—500*l.* in cash forthwith on demand; other 500*l.* by a bill of exchange payable in *London* at six months from the date of the agreement; the further sum of 4,000*l.* by a bill or bills of lading and in-

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voices for goods shipped on board the ship for her then intended voyage, and which goods, so to be contained in the bills of lading or invoices, should be made deliverable to defendant, his order, or assigns, to the intent that he might dispose of the goods on the arrival of the ship in *India*, and invest the proceeds thereof in other goods to be shipped on board the ship, and to be made deliverable to defendant in the port of *London*, by bills of lading of such last-mentioned goods for sale in the port of *London*; or, that the proceeds of the goods outward might be laid out in the purchase of a bill of exchange for the amount thereof, payable in *London*, at the option of the bankrupt; and then the net amount of such remittances, whether in goods or bills of exchange, to be in further payment of the purchase money; and all the residue of the purchase money, together with all interest due thereon, on an account to be truly stated at the end of three calendar months after the day of the arrival of the ship in the port of *London* from her intended voyage, and of her report inward at the custom-house there. It was then provided that, in the event of the loss of the ship during her intended voyage, the 7,350*l.* should be recoverable from the bankrupt, and that the policies of insurance already effected or to be effected by defendant, on the ship and her freight, should be deposited with him as collateral securities. Covenants by defendant, that at the end of the three calendar months from the arrival and report inward of the ship in the port of *London* from her intended voyage, and on the bankrupt's paying all the sums thereinbefore mentioned and thereby intended to be secured, and performing the covenants thereinbefore contained, he would bargain, grant, sell, assign, transfer, and set over unto the bankrupt, the ship, with all masts, sails, yards, &c. to the ship belonging, to hold to him absolutely for ever, free and clear from all debts, charges, &c.; and further, that on the bankrupt's so paying the monies and performing the covenants aforesaid, he should be entitled to take and receive to his own use all the net and clear gains and profits which had been and should be made and earned by, or in respect of, or on account of

the ship, and the employment, voyages, services, operations, and transactions thereof, from and subsequently to such termination and conclusion of the last voyage, down to and until such transfer and conveyance of the ship and her appurtenances. At the time of the execution of the articles of agreement the ship was lying at *Gravesend*, laden. *No indorsement of the agreement, or of any transfer or sale of the ship, was made upon the ship's register.* On the 30th of *May*, 1817, the bankrupt paid to defendant 500*l.* on account of the purchase of the ship, and gave him a bill of exchange for 500*l.* more, due the 17th of *November* following, which was duly honoured, and in *May*, 1817, also delivered to defendant a bill of lading of goods of the invoice value of 4,029*l.* 2*s.* 10*d.* which were consigned by defendant to *Palmer* and Co. at *Calcutta*. The bankrupt sailed in the ship fully laden on his own account, or on freight for his benefit, as captain. The ship arrived at *Madras* in *January*, 1818, and the bankrupt left the investment, and also the goods contained in the bill of lading delivered to defendant, with one *Rutter*, a merchant there, the bankrupt's own agent, to sell, and to account to him for the proceeds on his return. The bankrupt then proceeded on his voyage to *Calcutta*, where he relinquished the command of the ship, and *Palmer* and Co. appointed a Captain *O'Brien* to take her home to *England*, and the bankrupt returned to *England* by another ship. The ship returned to the port of *London* on 10th of *August*, 1819, and for more than three months thereafter defendant was ready and willing to perform the articles of agreement on his part: and during that time repeatedly required the bankrupt to complete the purchase of the ship, and pay the residue of the purchase money; but the bankrupt, being embarrassed in his circumstances, was unable to do so, and no part of the residue of the purchase money was paid. In *October* and *November*, 1819, defendant caused the ship to be advertised for sale at *Lloyd's*, but postponed the sale at the request of the bankrupt, in the expectation that his friends would enable him to complete

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the contract. On 3d of *December* the ship was put up for sale by defendant, and bought in at 3,050*l.* and afterwards, in or about *December*, 1819, or *January*, 1820, was actually contracted to be sold to one Captain *Chivers* for 6,300*l.*, upon a contract similar to the above articles of agreement, of which 6,300*l.* defendant received about 2,000*l.* and the remainder was to be paid three months after the ship's return from *India* to her port of discharge in *Europe*, upon defendant's empowering *Chivers* to take out the register in his own name. In addition to the 1,000*l.* above stated, defendant received from, or on account of the bankrupt, 6*l.* and 9*l.* 19*s.* and seven pipes of *Madeira* wine, worth 280*l.* Defendant, upon an application of the assignees, delivered to them an account in which he made the bankrupt debtor for the sum agreed to be paid as the price of the ship, mentioned in the articles of agreement, and for two bottomry bonds; for the outfit to *Calcutta*; for the premiums of insurance to and from *Calcutta*; for broker's charges; for seamen's wages, and for disbursements in *London* since the return of the ship: and on the other side of the account he gave the bankrupt credit for the two sums of 500*l.* paid as part of the price of the ship; for returns of premium; for the amount of an average loss settled by the underwriters on the ship in consequence of damage at *Calcutta;* for 2,000*l.* the proceeds of the goods which in the bills of lading were valued at 4,029*l.* 2*s.* 10*d.*; for the proceeds of the ship, sold for 3,050*l.* and of seven pipes of *Madeira* wine; and for the freight from *Calcutta* to *London*. Upon the account so stated, defendant claimed a balance of 3,043*l.* 5*s.* 3*d.* The questions for the opinion of the Court are, first, whether the articles of agreement of 27th *May*, 1817, are void under the Ship Registry Acts; and, second, whether they are void or not, in what mode or on what principle the account is to be taken between the assignees and defendant. The account to be taken by an arbitrator out of Court.

Reader, for the plaintiffs. The agreement of the 17th of

May, 1817, is a contract for the sale of a ship; it has never been indorsed upon the ship's register: consequently it is void by the 34 *G.* 3. c. 68. s. 15. That section recites, that, by the laws then in force, upon any alteration of property in any ship or vessel in the same port to which such ship or vessel belongs, an indorsement upon the certificate of registry was required to be made, and then enacts, that such indorsement shall be made *in the manner and form thereinafter expressed*, and shall be signed by the person transferring the property of the ship or vessel, by sale, or contract, or agreement for sale thereof; and that a copy of such indorsement shall be delivered to the person authorized to make registry, and grant certificates of registry, otherwise such sale, or contract, or agreement for the sale thereof, shall be utterly null and void, to all intents and purposes whatsoever. Now that section clearly requires the indorsement to be signed by the person transferring the ship by sale, *or contract or agreement for sale;* therefore, a contract or agreement for the sale of a ship not indorsed upon the register, is within its operation, and void. The form of indorsement given in the act does not, indeed, assist this argument, for it is, "I have this day sold and transferred," &c. altogether in the past tense, and without any express reference to a sale yet to be completed; but it does not materially militate against it. The construction now put upon this statute is not new, and is warranted by several grave authorities. *Abbott*, C. J. in his treatise on the Law of Merchant Shipping, p. 44. n. (y), speaking of this statute, says, "I have ventured to state that by this statute an indorsement is required in the case of contract or agreement for sale, as well as absolute sale; because, although the form of the indorsement is applicable to the case of actual sale only, yet, adverting to the words, 'transferring the property by sale, or contract, or agreement for sale,' used in this section (15), and to the words 'contract or agreement for transfer,' used in the preceding section (14), which there plainly denote something different from absolute transfer;

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it seems probable the legislature intended that the form of the indorsement should be varied according to the nature of the transaction; and that the words, *contracted to sell and transfer*, should be used in the indorsement instead of the words, *have sold and transferred*, if the case require it. So the expression *all* my right, &c. must be variable if the vendor transfer only *a part* of his interest in the ship." For this last position his lordship cites an authority which is strong in point both for that and for the present case, *Underwood* v. *Miller*(a). It was there held, that upon the transfer of a share in a vessel, it is not necessary that the indorsement upon the certificate of registry should express the share to be *all* the vendor's interest; and *Chambre*, J. said, "It would be a narrow and rigorous construction indeed, to say that the form which is given in the act for the sale of all, must be the only form applicable to all cases." Now, upon this principle, the section will apply not only to an actual sale, but to *an agreement for a sale*, and if so, this case comes within its operation. So in *Biddell* v. *Leeder*(b), it was held that an agreement for the sale of a vessel, with a present interest therein, though the purchase money was to be paid, with interest, at a future time, was void within the fourteenth section of this statute, for not reciting therein the certificate of the ship's registry; and *Best*, J. in his judgment there, said, "I think it quite clear that these statutes were intended to include *all* contracts for the transfer of vessels, immediate and future." But, independently of the statute, the defendant cannot now rely upon this agreement as a subsisting contract, for he has himself put an end to it by selling the ship. Then, secondly, how is the account to be calculated between the parties? Assuming the agreement to be void, the plaintiffs are, it should seem, entitled, first, to the 1,000*l*. paid by the bankrupt to the defendant, for that was paid upon a void contract; and then to the money disbursed by the bankrupt on account of the ship, the proceeds of the goods contained in the bill of lading, and the value of the wine and the other

(a) 1 Taunt. 387. (b) Ante, vol. ii. 499.

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goods belonging to the bankrupt, which were on board the ship at her return, and then passed into the defendant's possession. It cannot, perhaps, properly be contended, that the plaintiffs have any claim for wages or freight, for it will probably be held that the bankrupt forfeited his right to these by resigning the command of the ship at *Calcutta*, and neglecting to provide a homeward cargo for her. Upon the same principle the defendant may be entitled to the disbursements made by him on account of the outward voyage; but the loss that he may have sustained by being deprived of the employment of the ship on her outward voyage, is in the nature of unliquidated damages, and therefore, though that might sustain an action for a breach of the contract, it cannot be set off in the present action. If the agreement is valid, the plaintiffs have no claim at all, for then the balance of accounts appears to be against them.

Campbell, contrà. The real question is, whether the voyage, commencing in *May* 1817, and ending in *August* 1819, was made upon the account of the bankrupt, or of the defendant. If it was made upon the bankrupt's account, the balance is against the assignees, and there is an end of this action. It is admitted also, that if the agreement is valid, the balance is against the assignees. First, the agreement is valid. The 14th section of the statute has been prayed in aid of the argument on the other side, but it does not bear upon the case; or, if it does, its requisitions have been satisfied, for the agreement does recite the certificate of the ship's register. Then what does the 15th section require? That the indorsement shall be made *in the manner and form thereinafter expressed;* and that form clearly applies only to an actual executed sale of all the vendor's interest in the ship. The statute gives no form applicable to an executory agreement for a sale; therefore an indorsement of such an agreement *in the manner and form thereinafter expressed,* is impracticable, and such an agreement is good without it. In *Underwood* v. *Miller* (*a*) there was an

(*a*) 1 Taunt. 387.

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actual sale; therefore that does not touch the present case. But the form given by the act is headed "Indorsement on change of property:" here there was no change of property; therefore the case is not within the act. It has been expressly held that this form of indorsement can apply only to cases of total and absolute sale, and that it would not apply even to a transfer by mortgage, because the mortgagor and mortgagee cannot properly satisfy the terms vendor and purchaser: *Thompson* v. *Smith* (*a*). But, assuming the agreement to be void in this respect, it is still not void in toto; it may be void as a transfer of the property in the ship, and yet valid as a personal covenant by the defendant. For instance, where a rector granted an annuity out of his benefice, which is void by 13 *Eliz.* c. 20., and in the same deed covenanted to pay the rent-charge, it was held, that although the statute avoided the security of the rent-charge upon the living, yet it did not affect the personal covenant: *Mouys* v. *Leake* (*b*). So in *Mestaer* v. *Gillespie* (*c*), the Lord Chancellor seems to have been clearly of opinion, that an assignment of freight, which was comprised in the bill of sale of the ship, was not within the provisions of these statutes; and the inclination of his opinion was that the bill of sale, though void as to the ship, of which it purported to make a legal transfer, might be a valid agreement in a court of equity with respect to the freight. So, though a bill of sale for transferring the property in a ship, by way of mortgage, may be void as such, for not reciting the certificate of registry, yet the mortgagor may be sued on a collateral covenant, for the payment of the money contained in the same deed: *Kerrison* v. *Cole* (*d*). Now, here the bankrupt covenants to advance and pay all the port charges; that is a collateral and personal covenant; and those payments his assignees cannot recover from the defendant, for he is entitled to set them off as mutual credits. Secondly, if the agreement is void in toto, still the voyage was made on the bankrupt's account; consequently the balance is against the

(*a*) 1 Madd. 399.
(*b*) 8 T. R. 411.
(*c*) 11 Vesey, 625. 642.
(*d*) 8 East, 231.

assignees, and they cannot maintain this action. The bankrupt was not a mere agent; he did not sail merely as captain of the ship, and with a right to his wages and disbursements only. He acted under the agreement down to the ship's return to *London;* he then broke the agreement. His assignees cannot stand in a better situation than himself, and it is quite clear that he could not have maintained this action. He had all the benefit of the voyage; he sailed in the ship on his own account; he took out goods in her on freight for his own benefit; he had the entire dominion of the ship, and received no instructions from the defendant. The admission that the plaintiffs cannot recover for the wages or freight is decisive against them upon the whole case, for it shews that the bankrupt was not an agent, but that he made the voyage on his own account. Neither can the plaintiffs recover the 1,000*l.* under the count for money had and received; for the agreement was in part performed, and the bankrupt actually received the benefit arising out of it for a considerable time. [*Bayley*, J. Whose duty was it to make the indorsement?] That must be the joint act of both parties. It was the duty of the vendor, no doubt, to make it, but it was equally the duty of the vendee, if his title could not be perfect without it, to see it made; and that was in his power, for, being captain, the register was, of course, in his hands. There are cases in which it has been determined, that though the contract has not been performed, and the party paying the money has derived no benefit from the contract, and the consideration has failed, yet the money cannot be recovered back. Thus, where *A.* having obtained a patent for an invention, of which he supposed himself the inventor, agreed to let *B.* use it upon payment of a certain annual sum, secured by bond; this sum was paid for several years, when *B.*, discovering that *A.* was not the inventor, but that it was in public use before *A.* obtained his patent, brought an action for money had and received, to recover back the amount of the annuity paid. But it was determined that *B.* could not recover back the

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amount of the annuity so paid; both parties having acted under a mistake, and *B.* having had the use of the invention: *Tayler* v. *Hare* (*a*). [*Bayley*, J. That was on the ground that the consideration had not totally failed.] Nor has it here. At any rate the account must be so taken as to allow the defendant a full remuneration for the use of his ship during the voyage.

The case was argued on a former day in this term, when the Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J., who, after recapitulating the facts of the case, thus proceeded. There were two questions for our consideration; first, whether the agreement was void within the 34 *G.* 3. c. 68. s. 15., and second, upon what principle the account ought to be taken between the parties. It was contended for the plaintiffs, on the first question, that the agreement was void in toto, and, consequently, that they were entitled to recover all the money paid by the bankrupt to the defendant, or received by the defendant in part performance, or in respect of the contract, or in any manner connected with the voyage: except the costs of the outfit. We are all of opinion that an executory contract for the sale of a ship is within the provisions of the statute, and, consequently, that this agreement is void in toto, for want of a compliance with those provisions. But before we go the length of adopting the inference sought to be drawn in favour of the plaintiffs, it is proper to take a review of the very peculiar facts of this case. The non-compliance with the provisions of the statute may fairly be considered as the mutual fault, or rather perhaps as the mutual error, of both parties. The defendant was the person whose duty it was to make the indorsement on the certificate; but the certificate was in the possession of the bankrupt, and he never took the trouble to desire that the thing might be done.

(*a*) 1 N. R. 260.

The bankrupt received possession of the ship, sailed in her as captain, and continued in that situation until he chose to abandon it. When the ship returned to *England*, the defendant offered to complete the contract on his part, and to transfer the ship upon receiving the purchase money; but the bankrupt was unable to pay the money and complete the contract on his part. After waiting the three months specified by the contract, the defendant sold the ship at a less price than the bankrupt had agreed to give for her; having, in the interval, both received and paid considerable sums in respect of the contract. Things being in this state, the parties have agreed to refer the account to an arbitrator, to be calculated and arranged upon such principle as we shall think right. We all think the right principle will be this:—to charge the plaintiffs with such sums as the arbitrator may think the ship might have been chartered for, on such a voyage; with such costs as the defendant has properly incurred in the character of charterer of the ship; with such loss as the defendant has sustained by the bankrupt's abandoning the ship at *Calcutta*, and neglecting to provide her with a freight home; and, if the arbitrator shall see fit, with demurrage; and, against those several sums to place those sums received by the defendant in respect of the contract. It appears that some of the items in the account were not received in money by the defendant, or for his use by his agent, before the commencement of the action; that may become important for the consideration of the arbitrator, both with a view to the verdict and the costs; and he may make arrangement for their being paid, when received, so as to put an end to litigation between the parties. We think nothing can be allowed to the bankrupt for wages, or otherwise, as master of the vessel, he having forfeited all claim of that sort by abandoning her before the conclusion of the voyage. The verdict, therefore, will be entered for the plaintiff, or the defendant, according to the directions of an award to be made upon this principle.

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Assumpsit against executors. Declaration stated that the testator, at the time of his death, was indebted to *J. Y.* in 200*l.* and interest, upon a promissory note. That after the death of *J. Y.*, the note being unpaid, it was found before the coroner, upon view of the body of *J.Y.* then lying dead, by the oaths of lawful men, that *J. Y.* was felo de se, prout patet per recordum of the inquisition; by reason of which inquisition and felony, *J. Y.* forfeited the note, &c. to the King. That the King, by grant under his sign manual, assigned the note to plaintiff, as mentioned in a certain other inquisition, and delivered the note to plaintiff, of which defendants, after testator's death, had notice. Breach, non-payment, either by testator or defendants. Pleas, first, testator non assumpsit; second, that the note became due and payable to *J. Y.* during his life, and the causes of action did not accrue to him within six years before exhibiting plaintiff's bill, and issue thereon; third, nul tiel record of the coroner's inquisition, and issue thereon; fourth, that there was no such grant as plaintiff alleged. The second issue was found for defendants, and all the others for plaintiff. On motion to enter a nonsuit:—Held, first, that the second inquisition, mentioned in the grant, was an office of instruction only, and not of entitling, and need not be produced at the trial; second, that the grant passed the property in the note, though under the sign manual only. On motion in arrest of judgment:—Held, first, that the declaration sufficiently shewed the note to be a security for a debt, and that the debt and security passed to the crown by operation of law, and were assignable by the crown without indorsement; second, that, after verdict, the Court would presume the coroner's inquisition to have been found by twelve jurors, if twelve were necessary, as to which point, *Quære*. On motion to enter judgment for plaintiff, non obstante veredicto:—Held, first, that the plea of the statute of limitations was bad, for not shewing that *J. Y.'s* right of action was barred by the statute at the time of his death; second, that the King, not being named in the statute, was not within its operation; third, that the plea confessed a cause of action in *J. Y.*, which passed from him to the crown, and from the crown to plaintiff, and did not allege sufficient matter in avoidance:—Ergo, plaintiff was entitled to judgment non obstante veredicto.

Lambert *v.* Taylor and another, Executors of George Renton, deceased.

ASSUMPSIT. The declaration stated that *George Renton*, in his lifetime and in the lifetime of *John Younghusband*, to wit, on the 12th *May*, 1813, at &c. made his promissory note in writing, and delivered the same to *J. Y.*, and thereby promised to pay, on demand, to *J. Y.*, or his order, 200*l.*, with legal interest, whereby *G. R.* became liable to pay to *J. Y.* in his lifetime the sum of money in the note specified, according to the tenor and effect thereof; and being so liable, promised *J. Y.* in his lifetime to pay him the money in the note specified, according to the tenor and effect thereof. That *G. R.* did not pay the money in the note specified, or any part thereof, but was, at the time of his death, indebted to *J. Y.* in the whole of that money, and the interest due thereon. That afterwards, and after the death of *J. Y.*, the money then remaining due and unpaid, to wit, on the 11th *November*, 1818, at &c. before *T. A. Russell*, then one of the coroners of our lord the

King for the county of, &c. it was found, upon view of the body of *J. Y.*, then lying dead, by the oath of honest and lawful men of the same county, that the said *J. Y.* feloniously, wilfully, and of his malice aforethought, did kill and murder himself, as by the said inquisition before the aforesaid coroner, remaining of record, more fully appears; by reason of which said felony, and by force of the said inquisition before the said coroner, in form aforesaid taken, the said *J. Y.* forfeited to our lord the late King, *George* the Third, the said promissory note and the money due thereon. That afterwards, to wit, on the 23d *November*, 1821, at &c. his present Majesty did, by his warrant bearing date the day and year last aforesaid, under his royal sign manual, give and grant unto plaintiff, his executors, &c. among other things, the said note and money due thereon, mentioned and set forth, among other things, in *a certain inquisition of the 24th day of August*, 1819, and which note and premises had become so forfeited to his said Majesty as aforesaid, and all and every other the goods and chattels, monies, personal estate and effects of the said *J. Y.*, to which his said Majesty was then entitled, and in whose hands soever the same might be, and all his said Majesty's estate, right, title and interest thereto, together with full power and authority to plaintiff, his executors, &c. to ask, demand, sue for, recover, and give effectual releases and discharges for the same, and to settle all accounts and reckonings whatsoever relating thereto; to have and to hold the said note &c. unto plaintiff, his executors &c. upon the trusts, and for the interests and purposes in the said warrant expressed and declared; that is to say, among other things, that plaintiff, his executors &c. should call in and compel payment of the said monies due on the aforesaid security by the warrant granted, and of all other the debts due and owing to the said *J. Y.*, as by the said warrant, reference being thereto had, would more fully and at large appear; and his said Majesty then and there delivered the said note to plaintiff, of which said several last mentioned premises,

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defendants, as executors as aforesaid, afterwards and after the death of the said *G. R.*, to wit, on the 10th *April*, 1813, had notice, and were thereupon requested to pay the sum of money, in the note specified, to plaintiff, as such grantee as aforesaid, according to the tenor and effect of the said note, and of the said royal warrant whereby the same was so granted to plaintiff. Breach, non-payment by *G. R.* in his lifetime, and by defendants as his executors since his death. Pleas, first, the general issue, non assumpsit, and issue thereon. Second, that the note in the declaration mentioned became due and payable to *J. Y.* in his lifetime; and that the causes of action in the declaration mentioned did not accrue to the said *J. Y.* within six years next before the exhibiting plaintiff's bill; and issue thereon. Third, that there was no such record of the said inquisition before the said coroner as plaintiff in his declaration alleged; and issue thereon; which issue was proved for the plaintiff, the record being produced in Court. Fourth, that the King did not make to plaintiff any such grant as plaintiff in his declaration alleged; and issue thereon. At the trial before *Bayley*, J. at the *Summer* assizes for *Northumberland*, 1823, the plaintiff had a verdict on the first and fourth issues, with leave for the defendants to move to enter a nonsuit, in case the Court should think, either that the second inquisition, mentioned in the declaration, ought to have been produced at the trial, or, that the King's grant, being not under seal, was insufficient to pass to the plaintiff the legal interest in the note. The defendants had a verdict on the second issue. In *Michaelmas* term, 1823, a motion was made on the part of the plaintiff to enter up judgment for him, non obstante veredicto for the defendants, on the second issue. In the same term a motion was made on the part of the defendants for a rule, either to enter judgment of nonsuit in that event, or to arrest the judgment, on three grounds: first, that the note, not having been indorsed by *Younghusband* the payee, no interest in it passed by his forfeiture to the late King, nor by *his* demise to the present

King, nor by *his* grant or warrant merely under the sign manual to the plaintiff; second, that the coroner's inquisition, as set out on the record, did not shew the manner of the death; and third, that it was nowhere alleged on the record that the inquisition was found on the oaths of *twelve* lawful men. Under these circumstances the Court directed the whole to be presented for their consideration in the shape of a special case, which, after setting out the pleadings as above, stated the following facts:

The note of hand set out in the declaration was duly made by the defendant's testator, and given by him to *J. Younghusband* for value received. At the trial the plaintiff produced a grant or warrant from his present Majesty, bearing date the 23d *November*, in the second year of his reign, under the sign manual of his Majesty, and countersigned by two of the lords of the treasury; which grant or warrant, after reciting the inquisition of the 11th *November*, 1818, before the coroner, as mentioned in the declaration, proceeded to state, "that it had been represented to his Majesty by the commissioners, that by an inquisition on a writ ad melius inquirendum, issued out of the Court of *King's Bench* at *Westminster*, taken in the parish of *Alnwick*, on the 24th *August*, 1819, before the said sheriff, it was found, among other things, that *G. Renton*, of *Bamburgh* aforesaid, yeoman, was, at the time of the death of the said *J. Younghusband*, indebted to him in the sum of 200*l.* for principal, and 5*l.* for interest, due upon a certain promissory note, made by *G. Renton* and one *H. Harvey*, of *Bamburgh* aforesaid, deceased, jointly and severally to the said *J. Younghusband*, bearing date the 12th day of *May*, 1813, and that the said note was of the value of 200*l.* exclusive of interest." The warrant then stated that his Majesty granted to the plaintiff all and singular the bonds, notes, sum and sums of money, mentioned and set forth in the inquisition respectively of the 24th *August*, 1819: and also all such goods and chattels comprised and set forth in the said inquisition as were not sold as aforesaid, and which became for-

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feited to the crown, and all and every the goods and chattels, money, personal estate and effects, of *J. Younghusband*, to which his Majesty was entitled, and all his Majesty's estate, right, title and interest thereto, &c. The questions for the opinion of the Court are three: first, whether the plea of the statute of limitations was a sufficient bar to the action; if so, the verdict for the defendant to stand; if not, then second, whether either of the alleged grounds of nonsuit was sufficient; if not, then, third, whether any of the alleged grounds for arresting the judgment was sufficient.

Tindal, for the plaintiff. First, the plea of the statute of limitations is not a bar to this action, and the plaintiff is entitled to judgment non obstante veredicto. The date of the note given by *Renton* to *Younghusband*, was the 12th *May*, 1813, and it was payable on demand. The inquisition, finding *Younghusband* felo de se, was dated the 11th *November*, 1818. The debt, therefore, had vested in the King before it was barred by the statute, because the goods of a felo de se are forfeited to the King from the moment of the act done, independently of the period of the inquisition found: *Finch's Law*, 216; *Rex* v. *Ward* (*a*), *Toomes* v. *Etherington* (*b*). Then, so soon as the property vested in the King, the statute of limitations ceased to operate; for, generally speaking, no act of parliament can deprive the King of any right which he previously possessed, unless he is expressly named in it (*c*). Now the King is not named in the statute of limitations; therefore, that statute ceased to operate against him from *November* 1818, and it must be considered either as wholly extinct from that time, or, at least, as suspended during the time the debt remained vested in the King. If it was wholly extinct, cadit quæstio; and it ought to be held so, for else the King's grant of the debt is rendered inoperative. If it was only suspended, still this plea is bad. It states that the cause of action did not accrue to *Younghusband* within six years, which is clearly

(*a*) 1 Lev. 8. (*b*) 1 Saund. 361. (*c*) Plowd. 240.

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bad in form; for that might be true if the King had retained the note for seven years; and if that were the fact, it would be no answer to this action; therefore the plea raises an immaterial issue. Secondly, neither of the alleged grounds of nonsuit is sufficient. The second inquisition, mentioned by the King's warrant, was not required to be produced in evidence, because it was not put in issue. It could only be put in issue by the plea of nul tiel record, and there was no such plea. The only plea is that *Renton* did not promise, and that does not put the inquisition in issue. Perhaps the second inquisition is so indirectly alleged, that it was impossible for the defendants to traverse it; but that objection cannot be raised now: that is ground of special demurrer only. Besides, the first inquisition vested the property in the crown; the second, therefore, was perfectly immaterial: it was an office, not of entitling, but of information; and the plaintiff's title was complete without it, by the first inquisition and the King's grant. Nor is the grant insufficient for not being under the great seal. By the common law, indeed, no grant of *lands* by the King can be valid or pleadable, except it be under the great seal; *Lane's* case (*a*); but a grant of *chattels* was always held to pass under the privy seal; *Com. Dig. Patent*, c. 5. It is true the present grant is only under the sign manual; but the usage has always been to grant goods and chattels forfeited to the crown by warrant under the sign manual only; and the statute 59 *G.* 3. *c.* 94. being passed to empower the King to grant *lands* by warrant under the sign manual, is conclusive to shew that he before had the power of granting goods and chattels in that form. Thirdly, neither of the alleged grounds for arresting the judgment is sufficient. That the note was not indorsed by the payee, can make no difference to the crown. Being forfeited to the crown in its imperfect state, it became immediately vested in the crown by operation of law; and therefore it was assignable by the crown; for the crown may assign a chose in action, as a recognizance, obli-

(*a*) 2 Rep. 16. b.

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gation, &c.; or a debt; *Com. Dig. Assignment* (D). T objection that the inquisition, as set out on the record, do not shew the manner of the death, can be properly rais only by special demurrer: the fault, if any, is, that enoug of the inquisition is not set out; but it is pleaded with prout patet per recordum, and the record, by law, is in th Court: besides, such a defect is cured by verdict. That is not alleged on the record that the inquisition was foun on the oaths of *twelve* lawful men, is really no objection all; for no authority can be produced to shew that twel jurors are required on such occasions.* Both the old statu 4 *Ed.* 1., de officio coronatoris, and *Finch's* Law, b. 4 c. 2 p. 323, clearly lay it down that the coroner is not bound have a jury consisting precisely of twelve, but that the num ber may be either more or less; however, even if twelv were necessary, it will be presumed after verdict that th jury consisted of the necessary number.

Cross, Serjt., contrà. The two objections mainly to b relied on for the defendants certainly are, first, that the ple of the statute of limitations is an answer to the action, an second, that the note not being indorsed, no interest ha passed to the plaintiff, so as to entitle him to sue upon The declaration states that the plaintiff sues, not by virtu of a title accruing by the custom of merchants, but by a assignment from the crown. The plea states that the c became due in the life-time of *Younghusband*, and that th causes of action did not accrue to him within six year The replication takes issue on that plea, and the jury hav found that issue in favour of the defendants. If the plain tiff meant to contend, as it is to-day contended for him, tha the inquisition is a bar to the statute, and that the propert in the note vested in the crown before the six years ha expired, he ought to have replied that matter specially. There are cases which justify this position. *Murray* v. *The East India Company* (*a*) was an action by an adminis-

(*a*) 5 B. & A. 204.

trator upon a bill of exchange, made payable to the intestate, and accepted after his death. The declaration alleged the drawing of the bill, the acceptance subsequent to the intestate's death, the grant of letters of administration to the plaintiff, and the liability of the defendants. The plea stated that the cause of action did not accrue within six years, upon which the replication merely took issue; and the Court held that as the fact of the bill having been accepted after the death of the intestate appeared upon the face of the declaration, the plaintiff was not bound to reply specially. Now, here, the fact that *Younghusband* died before the six years had expired does not appear upon the face of the declaration; and assuming the fact to be that he lived over the six years, the statute of limitations is clearly a bar to this action. In *Rex* v. *Morrall* (a) the plea was, that the cause of action did not accrue to the crown debtor within six years next before his death; and that was held good on demurrer. So here, it does not appear formally and strictly upon the record, that the cause of action accrued to the crown within six years: the cases, therefore, are parallel, and these defendants are entitled to judgment. [*Abbott*, C. J. The argument against you is, that the plea is bad in itself, for not alleging that the causes of action did not accrue, either to *Younghusband* or to the plaintiff, within six years. *Holroyd*, J. Your plea is bad for uncertainty, for the fact on which it is founded may or may not be a defence to the action. If *Younghusband* died within the six years, the debt, upon his death, vested in the crown, and it would be no defence; if he died after the six years, it would be a defence. Your plea should have been that *Younghusband* did not die within the six years after the making of the note, and that the causes of action did not accrue either to him, or to the plaintiff, within six years.] Upon the authority of *Rex* v. *Morrall* this plea is clearly good, as against the plaintiff; whether it is good also as against the crown, it is not necessary to argue. Secondly, the note not

(a) 6 Price, 24.

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having been indorsed, the plaintiff has no title to sue upon it. The property in the note could not pass at all except by indorsement under the 3 & 4 *Anne*, c. 9. by which promissory notes are put on the same footing as bills of exchange, and rendered negotiable according to the custom of merchants. But the plaintiff rests his title, not upon an indorsement according to the custom of merchants, but upon an assignment from the crown; and he shews that the title of the crown accrued, not by an indorsement, but by forfeiture. Now, assuming that the crown might acquire the property in a promissory note without an indorsement, which seems doubtful, still it is clear that it could not transfer the property, except by indorsement. It has been decided that the administrator of the payee has power to indorse a promissory note, according to the custom of merchants; *Rawlinson* v. *Stone* (*a*); therefore, even if the property in the note vested in the crown by the forfeiture, it still could not pass from the crown to an assignee except by indorsement. The crown, it is admitted, may assign a debt; but here it has not done so. The thing assigned is a promissory note, which is only evidence of a debt; and as such the plaintiff himself treats it, for he does not allege any debt to be owing to himself, but sues merely as the person claiming under the note. Much need not be said upon the other objections. It must be admitted that it was not necessary to produce the second inquisition. Neither can it be contended that the grant is void for not being under the great seal, for the invariable usage seems to have been to grant goods forfeited by felony under the sign manual only. With respect to the finding of the coroner's inquisition, the usage has certainly always been for a jury of twelve to be present, and by analogy with the law respecting juries in general, it would seem that a fewer number could not be competent to act. Of this point, however, the Court will, in its wisdom, dispose. [*Bayley*, J. I apprehend the petit jury could not try a party upon a coroner's

(*a*) 3 Wils. 1; 2 Str. 1260; Barnes, 164, S. C.

inquisition, unless it had been found by twelve jurors at least.]

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Tindal, in reply. The declaration avers that the inquisition was taken on a specific day, prout patet per recordum. The plea is nul tiel record, upon which issue is joined, and found for the plaintiff. Now that is sufficient to shew that *Younghusband* died within six years after the date of the note. [*Abbott*, C. J. That issue might have been supported by producing a record of a different date.] The plea is bad, as raising an immaterial issue, and therefore no judgment can be found upon it for the defendant. [*Bayley*, J. The issue is, whether *Younghusband* had a right of action within six years before action brought. Now, if he had lived six years from the date of the note, the crown would have been barred, and then both the verdict and the merits would have been against the plaintiff. But, upon this issue, the verdict may be against the plaintiff, and the merits for him, because though *Younghusband* may not have had a right of action within six years, the property may have vested in the crown within six years after promise made, and so the assignee of the crown may be entitled. Then, as it is doubtful upon which state of facts the verdict proceeded, ought there not to be a repleader?] The plea of the statute of limitations bars the remedy only, not the right; it amounts to a confession and avoidance: then if the avoidance is insufficient, the confession stands good, and the plaintiff is entitled to judgment, *Pitts* v. *Polehampton* (a); and in *Rex* v. *Morrall* (b), the debt was barred before it vested in the crown. With respect to the objection that the declaration does not shew a debt seizable by the crown, it alleges not only that the note was given, but that a debt was actually due.

The case was argued on a former day in this term, when the Court took time to consider of their judgment, which was now delivered by

(a) 1 Lord Raym. 389.　　(b) 6 Price, 24.

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ABBOTT, C. J. who, after stating the pleadings and the facts of the case, thus proceeded. We are all of opinion that neither of the alleged grounds of nonsuit is sufficient. The second inquisition was an office of instruction only, not of entitling. The title of the crown accrued upon the finding of the felony under the first inquisition. The second formed no part of that title; its production at the trial, therefore, was unnecessary. The grant by the King under his sign manual was, we think, sufficient to pass the property in the note to the plaintiff. A chose in action, or a debt, vested in the crown, is assignable by law. No authority has been produced to shew that such an assignment must be under the great seal, or under seal at all; and the constant usage appears to have been to assign such chattels under the sign manual only. We are, also, of opinion that neither of the alleged grounds for arresting the judgment is sufficient. There is enough alleged upon the face of the declaration to shew that the note was given as a security for a debt, and we think that both the debt and the security vested in the crown by the felony, and were assignable by the crown without indorsement. The title of the crown accrues by operation of law, no indorsement therefore is necessary to give the crown a title; and the assignment by the crown is founded upon the general rule of law, and needs not to be supported either by the custom of merchants or any other special custom. Assuming it to be necessary that a coroner's inquisition should be found by twelve jurors, in order to its vesting in the crown the chattels of a felo de se, upon which point, however, we do not feel ourselves called to give any opinion, we think it must be taken after verdict that this inquisition was so found. The only remaining point is one arising upon the statute of limitations, 21 *J.* 1. c. 16. s. 3. The plea states that the note became due and payable to *Younghusband* during his life, and that the supposed cause of action did not accrue to him within six years before the exhibiting of the plaintiff's bill. Upon this plea the plaintiff took issue, and that issue has been found for the

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defendants. We are of opinion that the plea is bad in law. It is very different from the plea in *Rex* v. *Morrall* (*a*). That was a proceeding by scire facias at the suit of the crown, founded on a writ of diem clausit extremum against a debtor of the crown, under which the defendant was found indebted to the crown debtor upon a bill of exchange, and the scire facias called upon the defendant to pay that bill to the crown. The defendant pleaded that the debt was not contracted and did not accrue to the crown debtor at any time within six years next before the death of the crown debtor. Upon demurrer, that plea was held good, and upon this ground, that the crown is entitled only to its debtor's right, and can neither create nor revive that right, if it never existed or has become barred; and as the crown debtor could not have recovered if the statute had been pleaded, so neither could the crown, being placed in the same situation as its debtor. But here the plea does not allege that *Younghusband's* right was barred by the statute at the time of his death, and if his right was not so barred, it vested in the crown by his death, and the rights of the crown are not affected by the statute, for, not being named in it, the crown is not within its operation. Then, as the plea is bad, the defendants cannot have judgment, although the issue has been found for them, because the issue is joined upon an immaterial matter; and the only question is, whether there ought to be judgment for the plaintiff non obstante veredicto, or a repleader. That depends upon the question whether the plea does or does not contain a confession of a cause of action; for if the plea confesses a cause of action, and pleads in avoidance matter insufficient in law, the plaintiff is entitled to judgment non obstante veredicto: and if the plea does not confess a cause of action, there must, upon the authority of *Pitt* v. *Polehampton* (*a*) be a repleader. Now, assuming that a mere plea of actio non accrevit infra sex annos does not, in the general mode of pleading it, admit that a cause of action ever existed, yet this plea contains

(*a*) 6 Price, 24. (*b*) 1 Lord Raym. 390.

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something more, for it alleges that the note became *due and payable to Younghusband* during his life. That is clearly an admission that *Younghusband* once had a good cause of action, and if he had, then the right to sue passed from him to the crown, and from the crown to the plaintiff, unless the defendant has alleged some matter of fact sufficient in law to shew that the right did not so pass: or, in other words, unless the matter of fact pleaded in bar, be, in law, a good bar to the action. I have already stated that in our opinion it is not a good bar, therefore, a cause of action having been confessed, and not well avoided, the plaintiff is entitled to judgment. The rule, therefore, will be that judgment be entered for the plaintiff non obstante veredicto.

Judgment for the plaintiff.

Monday, May 16.

Plaintiff declared in assumpsit upon a contract for the sale of *copper sheathing*, that defendant undertook that it should be good, sound, substantial, and serviceable copper: and there being no proof that defendant had given a warranty such as that declared upon: Held, that he was not liable for any latent defects in the sheathing, although it was sold as "copper sheathing."

Gray and another v. Cox and others.

THIS was an action of assumpsit. The first count of the declaration stated, that in consideration that plaintiffs, at the request of defendants, had agreed to purchase of defendants a quantity of goods and merchandize, to wit, 300 plates of copper sheathing, of a certain weight per foot, to wit, &c. at and for a certain price agreed upon between them, to wit, &c. defendants undertook to furnish plaintiffs with such goods and merchandize as aforesaid, *of a good, sound, substantial and serviceable quality*. It then averred, that plaintiffs, relying upon defendants' undertaking, did buy the copper at the price aforesaid, but that defendants did not furnish such goods as aforesaid, of *a good, sound, substantial*, or *serviceable* quality, but on the contrary, did, instead thereof, supply plaintiffs with certain plates of copper sheathing of a very bad, unsound and worthless quality, by means whereof, plaintiffs, having affixed and fastened the said copper plates to a certain ship or vessel

of them, plaintiffs, were forced to lay out a large sum of money in taking them off again, and procuring other sheathing plates, and affixing them to the said ship. The second and following counts did not vary materially from the first, and each stated the warranty in the terms above-mentioned. Plea the general issue, non assumpsit. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after *Hilary* term, 1824, the case proved in evidence was this:—The defendants were copper merchants, but not manufacturers of copper. In *May*, 1821, the plaintiffs, who were owners of the ship *Coventry*, purchased of the defendants a quantity of copper sheathing for the purpose of coppering the bottom of that vessel. The copper was sold at the market price of the day, and a bill of parcels with a receipt was given in evidence. In the former the article was described as "*copper sheathing*," but there was no express warranty. The sheathing was put on the vessel by shipwrights employed by the plaintiffs, and to all appearance it was calculated for the purpose intended. The vessel proceeded upon her voyage to *Demerara*, and on her return in *January*, 1822, it was discovered that a great number of the plates were full of holes, and unfit for use and considerably reduced in weight. It was proved that copper sheathing for vessels usually lasted in a serviceable state for four or five voyages to the *West Indies*. The defendants themselves had purchased the copper of "The Mines Royal Copper Company," and had sent it to the plaintiffs in the state in which it had been originally purchased, charging only a profit of five per cent. No fraud was imputed to the defendants, and it was admitted that the defendants were wholly ignorant of the defective quality of the metal. The witnesses examined stated, that the sheathing in question was copper, and presented no appearance of any defect at the time it was sold. Under these circumstances it was contended, on the part of the defendants, that the action was not maintainable, first, because there was no warranty of soundness, and, second, that as there was no fraud or deceit, the maxim "caveat

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emptor," applied. The Lord Chief Justice refused a nonsuit, and in his charge to the jury told them, in point of law, that the seller of goods of a fixed and known price, for a particular purpose, must be understood by law to engage that the commodity sold was reasonably fit and proper for the intended use, and his lordship left the jury to determine, as a question of fact, whether the copper sold by the defendants to the plaintiffs was reasonably fit and proper for the purpose for which it was purchased. The jury under this direction found a verdict for the plaintiffs, damages 140*l.*

In *Easter* term last *Gurney* obtained a rule nisi for a new trial on the ground of misdirection. Cause was shewn against the rule in *Michaelmas* term following by *Scarlett* and *J. L. Adolphus*, and the Court after hearing *Gurney* and *Campbell* in support of it, directed, on account of the general importance of the question, that the case should be argued again this term.

J. L. Adolphus for the plaintiffs. The direction of the Lord Chief Justice at Nisi Prius was perfectly correct in point of law. Where a person purchases a commodity for a particular purpose, with knowledge on the part of the vendor of the purpose to which it is to be applied, and it turns out not to answer the description of commodity ordered, an action will lie against the latter. Here a specific article was ordered, which was well known in the trade, and the defendants were fully aware of the purpose for which it was to be applied. It was charged and paid for at the full market price, as "copper sheathing," and therefore it was incumbent on the defendants to supply an article of that description. The article turned out to be totally different from that ordered, both in weight as well as quality, and therefore the defendants are liable. In *Jones* v. *Bowden* (*a*), *Heath*, J. mentioned a case tried before himself on the home circuit, in an action on the sale of some sheep sold as *stock*,

(*a*) 4 Taunt. 847

and the evidence was that, by the custom of the trade, *stock* were understood to be sheep that were sound; and that learned judge told the jury that it amounted to an implied warranty that they were sound, and that direction, he said, was never questioned when the case afterwards came before the King's Bench. In *Yeats* v. *Pim* (a), which was an action for the breach of a warranty for the sale of fifty bales of prime singed bacon, *Gibbs*, C. J. held that where a party undertakes that he will supply goods of a certain description he must execute his engagement accordingly. Now here, the material sold was not only different in quality, but was also a different substance from that ordered, and in this respect the case of *Bridge* v. *Waine* (b) is a direct authority. But, independently of this ground of action, the defendants are liable upon the implied warranty which the bill of parcels, given in evidence, imported. They must be understood to warrant, that the copper was reasonably fit for the purpose to which it was to be applied. When a man sells goods at a certain price for a particular use, the law raises an implied warranty that it shall be fit and proper for that use. Here the jury, by their verdict, find that the article sold was not reasonably fit for the purpose of copper sheathing. The declaration avers the warranty to be that the copper was "of a good, sound, substantial, and serviceable quality." The bill of parcels proves the warranty, at least by implication. The words "copper sheathing," mean copper sheathing fit and proper for the purpose of coppering the bottom of a vessel. No limitation can be put upon the meaning of these words. The maxim "caveat emptor" does not apply to this case, because here there is an implied warranty, and that takes it out of the general rule that a buyer must himself be on his guard. The authorities all go to show that where there is a warranty, caveat emptor does not apply. In 1 *Inst.* 102. *a*, it is said, "that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him

(a) 2 Marsh, 141.   (b) 1 Stark, N. P. C. 504.

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not unless there be a warranty either in deed or in law, for *caveat emptor*. In the present case, however, there being an implied warranty, the case is taken out of the rule of common law. The doctrine of *Chandelor* v. *Lopus*(*a*), which was case for a deceit, respecting the sale of a bezoar stone, has been over-ruled by *Pasley* v. *Freeman*(*b*), where it was held that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the latter receives damage, is the ground of an action upon the case in the nature of deceit. The introduction also of assumpsit as the form of action upon a warranty, has very much relaxed the old law of deceit in favour of the party deceived. The absence of every thing like fraud or deceit will not prevent the plaintiffs from recovering in the present action, if there is enough here to raise an implied warranty. It was held by Lord *Ellenborough* in *Fisher* v. *Samuda*(*c*), that the vendee of goods might call upon the vendor to take them back, if they were unfit for the purpose for which they were ordered, provided the vendee gave notice of the defect as soon as it was discovered. The principle there laid down is expressly applicable to this case, because here the plaintiffs gave the defendants notice as soon as the defect was discovered. In *Gardiner* v. *Gray*(*d*) the same learned judge held, that without any particular warranty, it is an implied term in every contract that the purchaser shall have a *saleable* article answering the description in the contract. So in *Bluett* v. *Osborne*(*e*), which was an action for the price of a bowsprit which turned out to be defective, Lord *Ellenborough* again said, "A person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is sold." The case of *Laing* v. *Fidgeon*(*f*) is a still stronger authority for the present plaintiffs, because here the goods are manufactured. The case of *Prosser* v. *Hooper*(*g*) will probably be relied on by the other side, but

(*a*) Cro. Jac. 4. (*b*) 3 T. R. 51. (*c*) 1 Camp. 190.
(*d*) 4 Camp. 144. (*e*) 1 Stark, N. P. C. 384. (*f*) 6 Taunt. 108.
(*g*) 1 J. B. Moore, 106.

that is distinguishable from this, for there the article, which was saffron, was sold as of inferior quality, and the plaintiff kept it an unreasonable time before he made any objection, and on that ground the Court held that his conduct must control the contract. Whether the defendants be or be not the manufacturers of the article can make no difference as to the principle on which their liability is founded; *Herne* v. *Nichols* (a), *Fitzherbert* v. *Mather* (b). If the defendants have themselves been deceived, they have their remedy over against the real manufacturers, who were their agents in that respect. It is no answer to this action, to say that the plaintiffs had an opportunity of inspecting the copper and forming their own judgment. Relying upon the implied warranty that it answered the description of article which they ordered, their vigilance was not called into action. But an unskilful consumer of a manufactured commodity cannot be expected to have the means of judging whether it is of good or bad quality. He may be a judge of weight and measure, but he can form no judgment of latent defects. If an artist sells a picture, there is an implied warranty that he has used proper colours, and it would be no answer to an action against him, if it turned out that the colours had not been properly mixed, that the purchaser had an opportunity of inspecting the picture before he bought it. The only case on which the defendants can rely is *Parkinson* v. *Lee* (c), but that case is distinguishable from the present. That was the case of a sale of hops by *sample*, and as there was an attempt to add some other condition to the contract, the Court went into the question of intention, and on that ground came to the decision reported. Here no question of intention arises, the simple point being whether the defendants have not, in violation of their implied warranty, sold an article which is not only dissimilar, but wholly unfit for the purpose for which it was ordered.

Campbell, contrà. In considering this case it is important

(a) 1 Salk. 289. (b) 1 T. R. 12. (c) 2 East, 314.

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to attend to the form of the declaration, for upon that depends the question whether the defendants are liable. This is an action of assumpsit, not of deceit. The declaration is not framed upon the bill of parcels nor upon the receipt. In the bill of parcels the article is called "copper sheathing," and in the receipt it is called "copper." If indeed the pleader had alleged that the defendant had undertaken that the article was *copper* or *copper sheathing*, then the receipt, or the bill of parcels, would have been proof of the contract; but then it must have been shewn that the article supplied was not copper or copper sheathing, and would not have passed for such in the market. If the plaintiffs could have shewn that the article was totally dissimilar from that described in the bill of parcels, and could not have been recognized as copper or copper sheathing, then indeed the case would have come within the doctrine of *Bridge* v. *Wain*. Here, however, the declaration is founded upon a promise that the copper should be "of a good, sound, substantial, and serviceable quality." All the counts are framed nearly in the same language, and each contains a warranty against *secret defects*. It must be admitted that if such a warranty had been proved in evidence, undoubtedly the defendants would have had no locus standi, although they might have been perfectly free from fraud or negligence, or had used every precaution and taken the utmost care that the article should answer the purpose for which it was to be used. The promise declared upon was undoubtedly proved to have been broken, but the question is, whether the defendants ever did promise that the copper should be "of a good, sound, substantial, and serviceable quality." Now there was no evidence to prove that they had done so. The bill of parcels and the receipt certainly did not shew that the article was to be of any particular description. The bill of parcels only described the article as copper sheathing, and the receipt as copper, and all the witnesses agreed in stating, first, that the article was copper, and, second, that the defects, if any, were not visible or perceptible to a person of

ordinary skill in such matters. If there was any defect, it was latent and secret, and therefore the warranty declared upon completely failed in proof. Considering the case then as it stands upon the evidence, it is the common case of a bargain and sale of goods, without any warranty whatever, and, consequently, the maxim caveat emptor is an answer to the action. No warranty can be implied in this case. It is an universal rule with respect to the sale of goods, that caveat emptor applies, unless there is an express warranty, or manifest fraud in the transaction. In the ordinary case of the sale of a horse, a warranty of soundness cannot be implied, no matter what price may have been paid, or for what purpose it may have been purchased. So of other articles. The particular purpose for which a commodity is bought, cannot vary the liability of the vendor, nor can the price have any effect upon the contract, unless there is an express warranty or direct fraud proved. All the cases cited on the other side will, upon examination, be found rather in favour of than against the defendants. In *Yeats* v. *Pim* there was an express contract.* In *Bridge* v. *Wain* the contract was for supplying cuttings of scarlet cloth, and it being pr[illegible] that the cuttings supplied were not scarlet cloth, the.s and q recovered. In the cases of *Fisher* v. *Samuda* and ed write *Fidgeon* no question arose as to the extent of the warranty, and in both cases the plaintiff never saw the commodity sold. In *Gardiner* v. *Gray* the decision in the plaintiff's favour went expressly on the ground that the article supplied was different from that described in the contract. *Blaett* v. *Osborne* is expressly in point for the defendants, for Lord *Ellenborough* went on to say, after the passage quoted on the other side, "No fraud is complained of, but the bowsprit turned out to be defective upon cutting it up. I think the plaintiff is not liable on account of the subsequent failure." In the present case all fraud was negatived, and as the article was apparently adapted for the purpose intended, the defendants cannot be liable for any latent defect. In *Weall* v. *King* (*a*) the decision was founded upon custom, as explanatory of the con-

(*a*) 12 East, 452.

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tract. There was no evidence here that, by custom, "copper sheathing" meant copper sheathing that would last five voyages. The case of *Parkinson* v. *Lee* is precisely in point with this, and entitles the defendants to judgment.

The Court took time to deliberate, and judgment was now delivered by

ABBOTT, C. J.—At the trial of this cause before me, no evidence of an express warranty was given. The proof was that the plaintiffs had ordered of the defendants a certain quantity of copper sheathing or copper plates, and paid a fair market price. The plates were affixed to the vessel by a shipwright, the plaintiffs themselves not having seen the copper, and the shipwright who was employed for the purpose did not discover it to be in any respect defective. Indeed it was agreed at the trial that it was not possible to discover, from the appearance of the copper itself, that it was in any respect defective. The defendants were copper merchants and not manufacturers. It appeared further in evidence that upon the ship's return from her first voyage after the copper was put on, a very considerable number of the plates were found to be corroded by the effects of the salt water, and were so full of holes as to render it absolutely necessary to take them off and replace them by other plates, whereby certainly a considerable expense was incurred by the plaintiffs. At the trial, it occurred to me that if a person sold a commodity for a specific purpose, and with knowledge at the time of the sale that it was to be applied to that purpose, he must be understood, in point of law, to warrant that the commodity so sold should be reasonably fit and proper for the service for which it was sold; and under my direction the jury found their verdict for the plaintiffs. I am, personally, still strongly inclined to adhere to that opinion; but it is not necessary at present to decide whether the opinion so given was or was not a correct one, (although my learned brothers are strongly inclined to think

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that the opinion so expressed is not warranted by law,) for assuming that a person who sells a commodity for a specific purpose shall be understood by law to undertake that it is reasonably fit and proper for that purpose, yet the plaintiffs have not declared upon a warranty of that nature, but upon a general and unqualified promise, namely, that the goods should be good, sound, substantial, and serviceable. We are all of opinion that a warranty or promise to that extent, and in those general and unqualified terms, does not arise nor can be implied by law out of the circumstances of a sale like this, of a commodity with respect to which the defects were altogether unknown to the sellers themselves. For these reasons we are all of opinion that my direction at Nisi Prius was incorrect, and that the rule obtained by Mr. *Gurney*, for a new trial, must be made

Rule absolute for a new trial.

Exparte Beeching, Squires and others.

Monday, May 16.

A prisoner in custody of an officer of customs, on a charge of smuggling, and brought up by habeas corpus at common law, may controvert the truth of the return to the writ, on affidavit, by virtue of 56 *Geo.* 3. c. 100. s. 4.

Platt, on a former day, obtained writs of habeas corpora to bring up the bodies of these persons, who had been taken into custody at sea under the provisions of the Customs acts, and carried to the city of *Rochester*, and detained in custody an unreasonable length of time, for the purpose of being examined before a justice of that city, contrary to the provisions of the 57 *Geo.* 3. c. 87. s. 6. which enacts, that persons arrested under the authority of that statute shall be conveyed before one or more justices of the peace, residing *near to the place where such persons shall be so taken or arrested*. In the return now made to the writs, it was alleged, among other matters, that the prisoners had been carried to *Rochester* with their own consent, and there detained for the purpose of being examined on a charge of

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smuggling; whereupon affidavits were tendered on behalf of the prisoners for the purpose of contradicting the facts so stated in the return, but the Court, at first doubting its authority to inquire into the truth of the return, called upon

Platt to shew that the Court had such authority, and he contended that such authority was expressly given by stat. 56 G. 3. c. 100. which was made in extension of the Habeas Corpus Act, 31 *Car.* 2. c. 2., and is entitled "An Act for more effectually securing the liberty of the subject." By sections 1 and 2 of that act, writs of habeas corpus may be issued by, and be made returnable before, any of the judges, during vacation, in cases other than for criminal matter, or for debt. Section 3 enacts, "that in all cases provided for by this act, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return by affidavit or affirmation, and to do therein as to justice shall appertain." And section 4 enacts, "that the like proceeding may be had in the Court for controverting the truth of the return to any such writ of habeas corpus, awarded as aforesaid, although such writ shall be awarded by the Court itself, or be returnable therein." Then the only question is, whether the present is a case provided for by that act, or, in other words, whether these prisoners are persons confined "otherwise than for some criminal or supposed criminal matter." Now in order to determine what is, and is not, in connection with this subject, criminal or supposed criminal matter, it is necessary only to advert to the Habeas Corpus Act itself, from the language of which it is clear that the offence with which these prisoners are charged is not criminal within the meaning of that act, and, consequently, is a case provided for by the subsequent act (*a*). [*Bayley*, J. Is it not an indictable offence? Might they not have been indicted under the 45 *G.* 3. c. 121. s. 7.]

(*a*) See ss. 2. 3 21. of 31 *C.* 2. c. 2.

Clearly not, for that section is repealed by the subsequent statute of 3 *G.* 4. c. 110. s. 1. At any rate this is not a *crime* within the meaning of the 31 *C.* 2. c. 2. *Huntley* v. *Loscombe*(*a*); and therefore it must be a case provided for by the 56 *G.* 3. c. 100; for else these parties would be without the remedy of both statutes, which it was the express object of the legislature to prevent.

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Copley, A. G. (with whom were *Twiss* and *Maule*,) contrà. It has hitherto been considered as an inflexible rule that the return to a writ of habeas corpus issued by this Court cannot be contradicted. The statute 56 *G.* 3. c. 100. has at all events been considered as confined in its operation to writs of habeas corpus issued by a judge in vacation, and not to such writs issued in term time. No case is to be found where a different rule of construction has been laid down.

Abbott, C. J.—If no decision has taken place upon this statute, it is probable that the point was never made before. The object of the Habeas Corpus Act, 31 *Car.* 2. c. 2. was to provide against delays in bringing to trial such subjects of the King as are committed to custody for criminal or supposed criminal matters. The person making this return is not an officer to whose custody these persons have been committed, but he is a person who, by the authority given him, has taken them into custody. It seems to me, therefore, that the writs of habeas corpus in this instance are not to be considered as writs issuing under the statute 31 *Car.* 2., but as writs issuing at common law under the general authority of the Court, and consequently, that the discussion of the truth of the return is left open by virtue of the 56 *Geo.* 3. c. 100. s. 4. This is not the case of a committal to a gaoler or an officer of the Court for an offence known as a crime, and the only question is, whether this is a criminal matter. The

(*a*) 2 Bos. & Pul. 530. *Note.*

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object of the 56 *Geo.* 3. was to give the party a summary remedy by controverting the truth of a return, instead of putting him to bring an action for a false return. There is very good reason for not permitting the truth of a return to be traversed where the party is charged with a crime, for that would be trying him upon affidavits; but here we are not called upon to try whether these persons have committed an offence, or that which may be called an offence. The objection to the proceeding against these persons is, that they have been carried a distance of 140 miles from the place where they were originally arrested. Part of the allegation in the return is, that they were taken to *Rochester* with their own consent. Now I think the truth of the return in that respect may be controverted. The 56 *G.* 3. was passed in furtherance of the liberty of the subject, and therefore ought not to receive a restrained construction.

Bayley, J.—I am of the same opinion. The Habeas Corpus Act does not apply to cases where the writ is awarded by the Court itself, *Hobhouse's* case (*a*); and the object of the 56 *G.* 3. c. 100. certainly was that the party confined should have as speedy a remedy as possible, and should not be driven to his action for a false return. I therefore think that we are bound to examine into the truth of this return.

Holroyd, J. and Littledale, J. concurred.

The merits of the case were then discussed on affidavits, and in the result the prisoners were remanded.

(*a*) 3 B. & A. 420.

WARBURTON *v.* STORR.

Monday, May 16.

A. and *B* by agreement, not under seal, covenanted to refer a dispute to *C.*, and bound themselves in a penalty "for the true and faithful observance and performance of the award which should be made" by *C*; before any award made, *B* revoked his submission:—Held, that he thereby subjected himself to an action for the penalty.

DECLARATION in debt set out an agreement, by which, after reciting that differences had arisen between plaintiff and defendant, and that plaintiff had commenced an action against defendant, they agreed with and to each other, that they respectively should and would well and truly observe, perform and keep the award, order, arbitrament, and final determination of *A. B.* respecting the action; the award to be made within a time thereby limited. And each of the said parties thereby bound himself, his executors, &c. unto the other, his executors, &c. in the penal sum of 100*l.* for the true and faithful observance and performance, on their respective parts, of the award and determination which should be made as aforesaid. Averment, that plaintiff on his part performed the agreement, but that defendant, before the expiration of the time limited for making the award, hindered and prevented the said *A. B.* from making his award, according to the true intent and meaning of the agreement, in this that defendant by a certain deed poll, sealed with his seal, did rescind, revoke and make void all power and authority whatever given to the said *A. B.* by the agreement, whereby an action hath accrued, &c. Demurrer to the declaration, and joinder in demurrer.

Campbell, in support of the demurrer. This is an action of debt on simple contract, and the short question for the decision of the Court is, whether the defendant, by revoking his submission to the arbitration, has incurred the penalty stated in that contract. Now, the penalty could be incurred only by non-performance of an award actually made, for though the agreement contains several stipulations, the penalty is confined to that which provides for the performance of the award which should be made. That stipulation undoubtedly raises an implied promise not to revoke

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the submission, and for the breach of that implied promise the plaintiff might have maintained an action of assumpsit; but he has thought proper to bring an action of debt for the penalty, which he cannot maintain. The agreement is "to observe, perform and keep" the award, not "to stand to and abide" it. In the case of an arbitration bond, there is an acknowledgment from the first, of a debt due from the obligor to the obligee, and where the bond contained a condition that the parties should "stand to and abide" the award, it was held that the revocation of the submission was a breach of that condition; but that where the words were, "observe, perform, fulfil, and keep" the award, the condition was not broken, except by the non-performance of an award actually made, *Vynior's* case (*a*). Here, there is no agreement to stand to and abide the award, and there is no award made; therefore there is no breach of the agreement. So in 5 *Ed.* 4. 3. b. cited in *Vynior's* case, it is said, "If I am bound to stand to the award which *J. S.* shall make, I cannot discharge that arbitrament, because I am bound *to stand to* his award; but if it be without obligation, it is otherwise." Here there is no "obligation," and the agreement is in substance and effect no more than a mutual promise to perform the award if it shall ever be made. *Marsh* v. *Bulteel* (*b*) is no authority for the present plaintiff, because in that case there was a covenant not to hinder or prevent the arbitrator from making his award; which essentially distinguishes that from the present case.

Russell, contra. The defendant contracted to perform the award of *A. B.* and the only question is, whether he has broken his contract, because if he has, the penalty attaches, and the plaintiff is entitled to recover the amount. Now it is perfectly clear from both the reasons assigned for the third resolution in *Vynior's* case, that the revocation of the submission here was a breach of the contract. The first reason was that the party had not observed, performed and

(*a*) 8 Rep. 162. 3d Resolution. (*b*) Ante, vol. i. 106.

kept the award. It must be admitted that a distinction was there taken between the words "observe, perform and keep," and the words "stand to and abide;" but in common sense and parlance the former words convey a meaning quite as comprehensive as the latter, and they certainly imply a covenant not to prevent the making of the award, for how could the defendant observe, perform and keep the award, if no award was ever to be made? The second reason was that the obligor, by his own act, had rendered the performance of the condition of the bond, which was for his own benefit, impossible, and, therefore, that it had become single. That is precisely what the present defendant has done; and the principle there laid down is not confined to cases of a bond with a condition; on the contrary, it has been held in a variety of cases that where a party by his own act puts it out of his power to perform his contract, that act is by law a breach of the contract. *Chamley* v. *Winstanley* (*a*), *Milne* v. *Greatrix* (*b*), *King* v. *Joseph* (*c*), *Mayne's case* (*d*), *Hotham* v. *East India Company* (*e*), and *Waddington* v. *Bristow* (*f*). Upon these authorities it seems clear that the contract in this case has been broken, and the legal result of that breach is that the penalty has attached.

Campbell, in reply. The adoption of the same words, "observe, perform and keep," both in the original clause of submission and in the penal clause, shew most clearly the intention of the parties to have been, that the penalty should not attach except upon the non-performance of an award actually made. The defendant, therefore, merely agreed to pay the sum of 100*l.* upon the happening of a contingent event, and as that contingent event has never happened, his liability to pay the money has never accrued. One, only, of the cases cited bears any resemblance to the present, namely, *Chamley* v. *Winstanley*, and there, it is to be observed, that the word "abide" is used. With respect

(*a*) 5 East, 266. (*b*) 7 East, 608. (*c*) 5 Taunt. 452.
(*d*) 5 Rep. 21. (*e*) Doug. 272. (*f*) 2 B. & P. 452

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to *Vynior's* case, it is sufficient to say, that the first reason there assigned is decidedly in favour of the defendant, and that the second does not apply at all, because that has reference only to those cases in which a bond has been executed.

The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J. who, after stating the pleadings, thus proceeded. The argument relied on for the defendant was founded mainly on the third resolution in *Vynior's* case. In that case, however, it is to be observed that two reasons are given for the judgment of the Court. The first is formal, and arising out of the language used in the instrument which formed the subject matter of that suit. The second, which may be called the substantial reason, arising out of a well known and established rule of law, that where a party covenants to do a certain thing, and afterwards by his own act disables himself from doing that which he covenanted to do, that shall in itself be considered as a breach of covenant. That is a rule of law so well established, that authorities need not be cited in support of it. Now the third resolution in *Vynior's* case is this:—"By the countermand or revocation of the power of the arbitrator, the obligee shall take benefit of the bond, and that for two reasons; first, because he has broken the words of the condition, which are, that he should stand to and abide, &c., the rule, order, &c., and where he countermands the authority of the arbitrator, he doth not stand to and abide, &c., which words were put in such conditions, to the intent that there should be no countermand, but that an end should be made by the arbitrator of the controversy, and that the power of the arbitrator should continue till he had made an award; and when the award is made, then there are words to compel the parties to perform it, namely, 'observe, perform, fulfil, and keep' the rule, order, &c., and this form was invented by prudent antiquity, and it is good to follow, in such cases, the ancient

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forms and precedents, which are full of knowledge and wisdom." Now, the words "stand to and abide," are not found in the contract which is the subject of the present action, and in that respect the party who framed the contract has departed from the ancient forms, and by that departure has shewn the force and truth of the observation made by Lord *Coke*, namely, that it is good to follow the ancient forms and precedents, for by that departure he has given rise to the present controversy. The distinction that has been drawn between the different expressions above cited, I must own, to my mind appears very nice and subtle and I, for one, am certainly unable to perceive any real and substantial difference between them. But the second reason in *Vynior's* case is clearly applicable to the present, and to the instrument now before us. That is, that the obligor has by his own act made the condition of the bond impossible to be performed, and by consequence the bond has become single. Now applying that to the case of a covenant, it falls exactly within the general rule which I began by mentioning. So here, the party had agreed under a penalty that he would well and truly observe, perform, and keep the award, and by discharging the arbitrator and revoking his submission, he has rendered himself unable so to do, and has in our opinion broken his agreement, and subjected himself to an action for the penalty. For these reasons we are of opinion that the judgment of the Court must be for the plaintiff.

Judgment for the plaintiff.

Lewis v. Thomas.

Monday May 16.

Discharging a rule for judgment as in case of nonsuit, on plaintiff's giving a peremptory undertaking, does not prevent the defendant from afterwards moving for the costs of the day for not proceeding to trial pursuant to notice.

A RULE nisi for judgment as in case of a nonsuit having been obtained on a former day,

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Chitty now moved to discharge the rule on a peremptory undertaking to try the cause, and he produced an affidavit containing a sufficient excuse for not going to trial before.

gers, contrà, said he had no objection to his rule being discharged upon a peremptory undertaking, provided he was not precluded from moving hereafter for the costs of the day for not proceeding to trial. If his rule were discharged on a peremptory undertaking, he feared that by the practice of the Court, as laid down in the books, he would not be entitled to move afterwards for the costs of the day for not proceeding to trial. In *Tidd* (a) it is laid down that the defendant, after moving for judgment as in case of a nonsuit, cannot be allowed to apply for costs for not proceeding to trial. So in *Hullock* on Costs, 404, and in *Archbold's* Pr. (b), the same rule of practice is stated to prevail in this ourt.

BAYLEY, J.—I am of opinion, notwithstanding what is laid down in the books of practice, that if the defendant has his rule for judgment, as in case of a nonsuit, discharged upon a peremptory undertaking, he may still apply for the costs of the day for not proceeding to trial pursuant to notice. By moving for judgment as in case of a nonsuit, he claims the *whole* of the costs; but if the rule is discharged upon giving a peremptory undertaking, I see no reason why he may not afterwards come to the Court for part of the costs.

The point was afterwards mentioned to the other judges, and the whole Court concurred in this determination.

Rule discharged.

(a) 8th ed. 819. (b) Vol. ii. 217, 1st ed.



HUGHES *v.* STATHAM (*a*).

Quære. Whether an agreement, whereby the town-clerk of a borough undertook that in consideration of plaintiff having consented to a dissolution of partnership with him as an attorney, "he would use all his best endeavours, and exercise his influence to procure the prosecutions for felony arising in the town-clerk's office," to be divided between plaintiff and three others, is not void, as being contrary either to the 22 *G.* 2. c. 46. s. 14. or to the general policy of the law.

ASSUMPSIT for the breach of an agreement, whereby in consideration that plaintiff had consented to a dissolution of co-partnership with defendant in the profession and practice of an attorney, the latter undertook "*that he would use all his best endeavours and exercise his influence to procure the prosecutions for felony, arising in the town-clerk's office* of the borough of *Liverpool*," to be divided between the plaintiff and three other persons, in four equal parts. Plea, non assumpsit and issue thereon. At the trial, before *Hullock*, B. at the last *Summer* assizes for the county of *Lancaster*, it appeared in evidence, that prior to the 1st *March*, 1816, when the agreement in question bore date, the plaintiff had been in co-partnership with the defendant in the business and practice of an attorney with three other gentlemen. The defendant was town-clerk of the borough of *Liverpool*, and he was so described in the declaration. In the town-clerk's office three descriptions of prosecutions for felony arose, namely, those prosecuted at the borough-sessions, at the general quarter-sessions for the county, and at the county assizes respectively. It was proved that the defendant acted as clerk of the peace at the borough-sessions in virtue of his office of town-clerk, and in that character received the usual fees payable to the clerk of the peace. The breach of agreement relied upon was, that the plaintiff had not had his fourth part or share of the prosecutions for felony arising in the town-clerk's office, which were transmitted for trial to the general quarter-sessions and the assizes respectively. It was stated that he had always had his fourth part or share of the felony prosecutions tried at the borough-sessions. On the part of the defendant parol ev-

(*a*) The King's warrant having issued during last term, three of the judges sat pursuant thereto, from *Tuesday*, 17th *May*, until *Saturday*, 21st *May*, and from *Monday*, 30th *May*, until the first day of *Trinity* term, both inclusively, when this and the subsequent cases were decided.

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dence was tendered to explain the import of the written agreement by shewing that, at the time it was entered into, it was the understanding of all parties that it was only to extend to such prosecutions for felony arising in the town-clerk's office as were tried at the borough-sessions. The learned judge rejected the evidence, but reserved the question of its admissibility for the opinon of the Court, and the plaintiff had a verdict, with liberty to the defendant to move for a new trial.

Coltman in *Michaelmas* term obtained a rule nisi for a new trial, or to arrest the judgment, on either of two grounds, first, that the evidence tendered at the trial was improperly rejected; and second, that the agreement declared upon was nudum pactum either at common law, or within the spirit and meaning of the statute 22 *Geo.* 2. c. 46. s. 14.

Cross, Serj., *Parke*, and *Patteson*, now shewed cause, and addressed themselves, in the first instance, to the second ground on which the rule nisi had been obtained. The objection taken to the legality of the contract comes now too late; for if the defendant meant to avail himself of it, he should have taken it at the trial, when it might have received a satisfactory answer. But, admitting it not to be out of time, it will be found, on consideration, untenable. The agreement is, that the defendant "shall and will use all his best endeavours and exercise his influence to procure the prosecutions for felony arising in the town-clerk's office to be divided in the following manner," &c. Now the only ground on which this agreement can be assailed is, that it is against the policy of the common law, or in violation of some statute. The Court will not go out of its way to put a strained construction upon it, in order to set it aside, nor will they determine that it is against the policy of the law or in violation of the statute 22 *Geo.* 2. c. 46. s. 14., unless it is plainly and manifestly so. First, is it void at common law? The agreement imports in its very terms to

have been entered into for a legitimate object, namely, the promotion of prosecutions for felony, and the bringing of offenders to justice. So far from being in violation, this is an object in furtherance of the general policy of the law. It is analogous to the case of *Bunn* v. *Guy* (*a*), where a contract entered into by a practising attorney to relinquish his business and recommend his clients to other attornies for a valuable consideration, and t[illegible] would not himself practise in such business within certain limits, and would permit them to make use of his name in their firm for a certain time, but without his interference, was holden to be valid in law. [*Bayley*, J. That case is very different from this; that was an agreement respecting private business, in which the public was not at all concerned.] This agreement necessarily imports that the defendant is to use all lawful endeavours, and exercise all lawful influence in the procuration of prosecutions. At least the contrary will not be presumed; neither will it be presumed that the persons, amongst whom the prosecutions are divided, are incompetent to the transaction of such business. All that the agreement in substance amounts to is, that the defendant will recommend the plaintiff, and the other parties alluded to, as persons more likely than others to carry on with effect the prosecutions entrusted to them. In this there is nothing unlawful: there is no fraud in the transaction, nor is there any violation of a known principle of common law, on one or both of which grounds the cases hitherto decided have been founded. Then, secondly, is there anything in the transactions contrary to the statute? The 22 *Geo.* 2. c. 46. s. 14. enacts, "that no *clerk of the peace*, or *his deputy*, nor any *under-sheriff*, or *his deputy*, shall act as a solicitor, attorney, or agent, to sue out any process at any general or quarter-sessions of the peace to be held for any county, riding, division, city, town corporate, or other place within this kingdom, where he shall execute the office of clerk of the peace, or deputy clerk of the peace, under-sheriff, or deputy, on any pretence whatsoever." Now the objection

(*a*) 4 East, 190.

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being in arrest of judgment, it must be shewn that there is something on the face of the record which brings the case within the terms of this act of parliament. Here there is no averment that the defendant was clerk of the peace and assuming the contract to be illegal in principle, still the prohibition does not extend to town-clerks, which office only, according to the declaration, the defendant fills. It is clear, therefore, that the case does not come within the words of the statute, so far as the office of the defendant is concerned. But admitting that, as town-clerk, he is required to act as clerk of the peace of the borough sessions still it cannot be said that this bargain is in violation of the statute. The defendant, in the language of the act, does not practise as an attorney in "suing out any process at any general or quarter-sessions." As town-clerk he has no possible control over the business which comes to his office. In that capacity he merely acts as clerk to the justices in taking down depositions, and if there happens to be a case of felony brought into the office, he has the opportunity of recommending an attorney to the person who appears as the prosecutor, which he is at liberty to do without incurring any legal responsibility. [*Bayley*, J. But would it be legal for him to bargain to have an annuity out of the profits of the business procured by his recommendation?] An annuity out of profits arising from prosecutions would probably be illegal; but upon the face of this contract the defendant is town-clerk merely. [*Bayley*, J. I am not putting it as this record now stands; but taking it as a fact, that the clerk of the peace has it in his power to recommend an attorney to business of this nature, would it be legal, as far as regards public policy, for him to bargain to have a gross sum, or so much money per annum or so much for each recommendation? Is not this bargain in contravention of the principle of the act of parliament, or of public policy, as explained by the act?] Certainly the only way in which this case can be brought within the operation of the act, is to say, that it is within the equity of it, by holding that the prohibition extends to an indirect as well as a direct partici-

pation in the profits of professional practice; but here there is nothing to shew that the defendant derives any benefit whatever from the recommendation of prosecutions for felony. [*Bayley*, J. Does not the defendant derive a benefit by inducing the plaintiff to leave a partnership concern, which was probably lucrative, upon the principle of this bargain? The plaintiff would have a right to say, "I shall not withdraw from the partnership unless you give me a sum of money," the defendant says, "I cannot give you money, but I'll give you money's worth, by helping you to prosecutions arising in the town-clerk's office." Does not that enable him to derive an advantage which he would not otherwise have been able to gain?] But this would not be done as clerk of the peace, and as town-clerk he would not come within the operation of the act. There is no fraud here on third persons; for though the defendant may recommend, yet there is no obligation on the part of a prosecutor to employ the plaintiff, and if he does employ him, there is an implied competency to discharge the duty with skill and fidelity, and, at all events, a responsibility if he fails in either of these particulars. [*Bayley*, J. From the report of the evidence, it should seem that the town-clerk of the borough of Liverpool is ipso facto clerk of the peace at the borough-sessions.] Unless this appears upon the record, the fact, taking it to be so, cannot be assumed to ground a motion in arrest of judgment. Then as to the evidence rejected by the learned judge; that was not offered for the purpose of explaining any latent ambiguity in the instrument, but absolutely to contradict its terms. The agreement in express language comprehends *all* the prosecutions for felony arising in the town-clerk's office, and therefore parol evidence could not be received for the purpose of restraining its import, and confining it to felonies to be tried at the borough-sessions.

Coltman, in support of the rule. Many things were taken for granted at the trial, as not requiring proof. No

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facts went to the jury. The only facts proved in addition to the agreement were, that previous to the execution of the instrument, the defendant was the town-clerk, that he acted as the clerk of the peace at the borough-sessions, and that three descriptions of prosecutions for felony arose in the town-clerk's office. Upon the rejection of the evidence offered to shew that the agreement must be restrained to prosecutions for felony carried on at the borough-sessions, a verdict was submitted to, subject to the opinion of the Court as to the admissibility of the evidence. Now, such evidence was admissible. It was not offered to contradict the instrument, but to explain an ambiguity as to the intention of the parties. Until this action was brought, it was never conceived that the agreement extended to prosecutions for felony carried on at the county quarter-sessions and the assizes. The plaintiff had always had his share of the borough prosecutions from the date of the agreement, and until now it was never sought to extend its operation. As town-clerk, indeed, the defendant could have no control over any other prosecutions than those to be tried at the borough-sessions, which *Rex* v. *Johnson* (*a*) seems to indicate. But, assuming him to have any influence in procuring prosecutions for felony arising in the town-clerk's office, which were to be tried out of the borough, it could hardly be conceived that the defendant meant to exclude himself from any share of interest in such prosecutions. It was, therefore, competent for him to shew by other evidence, and by the conduct of the parties themselves, that such a construction of the agreement was never contemplated. It must be taken to have been the intention of the

the defendant, *as town-clerk*, to use his influence in procuring such prosecutions as arose in his office, and tryable at the borough-sessions, would, probably, not be illegal. At least the case of *Bunn* v. *Guy* might have led the parties

(*a*) 4 M. and S. 515.

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to suppose that there was nothing illegal in such a contract. It was with this view that the parol evidence was offered, in order to prevent the parties going into chancery to adjust their rights, and put that construction upon the agreement which they had intended. But then comes the more important question, whether such an agreement can be recognized in a court of law. If it be true, as is contended on the other side, that the agreement is not to be confined to prosecutions carried on at the borough-sessions, but extends also to prosecutions at the county quarter-sessions and the assizes, then it is impossible for the plaintiff to avail himself of it. However, it must not be taken for granted, that even if it is restrained to borough prosecutions, it would be a legal agreement. The town-clerk stands, by virtue of his office, in the situation of legal adviser to the borough justices upon all matters within their jurisdiction. It cannot, therefore, be admitted, that the town-clerk can sell the influence of his office. But the objection is still stronger, when it appears, as the fact is, though it does not appear upon the record, that the town-clerk also acts as clerk of the peace in the borough. It is unnecessary to bring the case within the precise words of the statute in order to establish the illegality of this agreement. The 14th sect. of 22 *Geo.* 2. c. 46. begins by reciting that, "to the end that justice may be impartially administered in the several general or quarter-sessions in this kingdom;" and then goes on, "be it enacted that no clerk of the peace, or his deputy, shall act as a solicitor, attorney, or agent," &c. This is merely a statutable declaration of the impropriety of any person in the situation of the clerk of the peace having any interest whatever in public prosecutions. The mischief which such an agreement is calculated to produce is quite obvious. It has a tendency to produce a bias in the mind of the party recommending, and induce him to depart from that impartial and disinterested course which ought to influence the conduct of a public officer, and produce a spirit of jobbing inimical to the due administration of justice. The

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policy of the law is, that all public offices should be properly filled, and the duties of them purely administered. If the principle on which this contract is founded can be sanctioned, there will be nothing to prevent persons in the defendant's situation from annually putting up the patronage or influence of their offices to auction, and selling it to the highest bidder, to the great detriment of the public interest, and the violation of those principles on which official duties must be conducted.' It is sufficient to shew that such contracts have a tendency to produce mischief, in order to declare their illegality. Upon this principle it is, that certain wagers have been declared illegal and void. *Allen* v. *Hearn* (a), *Hartley* v. *Rice* (b), *Gilbert* v. *Sykes* (c), &c. Then if it be illegal for a clerk of the peace to practise directly as a solicitor or attorney, can he do so indirectly? This is an indirect means of doing that which the statute prohibits from being done directly. It is in effect a mode of deriving a profit from the defendant's situation, which the legislature prohibits from being done openly. Assuming that the defendant is not the clerk of the peace, still the same principle applies to his office of town-clerk, and such an agreement is equally in violation of the policy of the law. In *Card* v. *Hope* (d) an indirect sale of the appointment of commander to an *East India* Company's ship, was declared void. Here is a manifest evasion of the statute, for if the defendant cannot derive a benefit from the patronage of his office directly, he shall not make a profit of it indirectly. In this view of the case, it matters not whether he is or is not in fact the clerk of the peace. As town-clerk, he stands in the situation of confidential adviser to the borough justices in matters of law; and he will be open to the temptation of improper motives, if he is allowed to make an extraordinary profit of his place, by selling the patronage and influence of his office to attornies in the

(a) 1 T. R. 56.

(b) 10 East, 22.

(c) 16 East, 150.

(d) Ante, Vol. IV. 161.

town of *Liverpool*. On these grounds the rule must be made absolute.

Bayley, J.—We think there ought to be a new trial. I am of opinion, however, that the parol evidence offered was properly rejected. It was not intended to explain any thing which could be called a latent ambiguity, but obviously to contradict the simple meaning of the words used in the agreement. The agreement is "to procure the prosecutions for felony arising *in the town-clerk's office* to be divided in the following manner," &c. I agree that the defendant was at liberty to prove, that of the prosecutions arising in the town-clerk's office, some went to the borough-sessions and others to the county-sessions or assizes, and having gone so far, it was then matter of legal construction, as to the meaning of the words "prosecutions for felony arising in the town clerk's office." I think the defendant was not at liberty to say, "I did not mean to include by these words, all prosecutions that arise in the town-clerk's office, but particular descriptions of prosecutions only." It may possibly have been the intention of the parties, to include only those prosecutions which ultimately ended at the borough-sessions; but I think that the words in their fair import include the prosecutions at the quarter-sessions and assizes as well as those at the borough-sessions. The ground of my opinion, however, that there ought to be a new trial is, in order to let in evidence with a view to the legal effect of this agreement. I think it cannot be doubted, that the agreement itself reflects little credit upon the parties to it. But the question which will arise upon a new trial, when the exact nature of the defendant's office is ascertained, will be whether, either under the 22 Geo. 2. c. 46. or at common law, this is an agreement out of which the law will raise any binding promise whatsoever. It is urged in the argument for the plaintiff that, as this question was not raised at the time [illegible] the other side are not at liberty now to discuss [illegible] However,

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that a defendant is not bound at his peril to suggest any point of law, which facts proved at nisi prius may raise, but that he is at liberty afterwards to avail himself of any legal objection to the plaintiff's right of recovering. Now the 22 *Geo.* 2. c. 46. s. 14. after reciting, "that to the end that justice may be impartially administered in the general or quarter-sessions in the kingdom," enacts, "that no clerk of the peace or his deputy, nor any under-sheriff or his deputy, shall act as a solicitor, attorney, or agent, to sue out any process at any general or quarter-sessions of the peace to be held for any county, riding, division, city, town corporate, or other place within this kingdom, where he shall execute the office of clerk of the peace, or deputy clerk of the peace, under-sheriff or deputy, on any pretence whatsoever." I think this is an act which ought to receive an extensive construction; such as will best carry into effect, that which, according to the recital, is the object of the legislature. Now if a clerk of the peace cannot be directly concerned as an attorney, a grave question will arise in this case, whether this agreement is not a contrivance by which the defendant may have an indirect concern in the conduct of prosecutions. Could he sell prosecutions, or could he sell the right [illegible] recommend them? That will be one question. If he cannot sell, can he take any other indirect emolument, arising from a bargain, for the recommendation of business which may pass through the office of the clerk of the peace? I cannot predicate what my opinion will be when all the facts of the case are distinctly brought before the Court, but I strongly feel the objection to the principle upon which this agreement appears to be founded. If such an agreement can be upheld, there is nothing to prevent a clerk of the peace from making such a bargain either for the whole of the time h[illegible] in office, or for a certain term renewable at intervals, an[illegible] by increase or diminish the price of his influence [illegible] to circumstances. I take the object of the legi[illegible], to enforce the impartial and disin-terested [illegible] the duties of the office of clerk of the

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peace; and therefore the policy of the law requires that such contracts shall be prevented, as may give the clerk of the peace a personal interest in those prosecutions which he may have the power to recommend. Now this is a very probable interest which a clerk of the peace may possess, if he has the power of selling his recommendations to an attorney: "I bargain with you, for my recommendations for the next year." If in the course of that year, the clerk of the peace shews favour to those who have adopted his recommendation, and he rather disfavours those who have not, the possibility will be, that towards the end of the year, people will be more ready to adopt his recommendation in a future year. The profit, therefore, that may arise from these recommendations will be from time to time greater as parties find that those recommendations are attended with favour from the clerk of the peace or not. That is one point of view, as it seems to me, in which, with reference to the statute, this case will have to be ultimately considered upon a new trial. Independently, however, of the statute, I should feel considerable difficulty in holding that a bargain of this description could be upheld at common law. Here is a town-clerk, who is a public officer, and who of course comes in contact with persons who are from time to time carrying on prosecutions. The public has a deep interest, in the due and proper conduct of prosecutions. When, therefore, a prosecutor applies to a town-clerk or to any other person in a similar situation, for his recommendation to an attorney to conduct the prosecution, it will be expected that a fair and honest recommendation, according to the best of his discretion and judgment, shall be given as to who is the fittest person for such a purpose. If, however, the town-clerk has an interest in recommending, or has tied himself down to recommend a particular person, the public will not have the fair and uncontrolled exercise of his honest, unbiassed, and impartial judgment. A bargain of this kind has, therefore, in my opinion a tendency to produce what may operate as a fraud upon third persons. Although

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I have suggested these observations, yet I do not mean to say that I have formed any conclusive opinion upon the subject. They are the present impressions of my mind, and it is in consequence of the view in which the case now strikes me, that I think we ought to grant a new trial in order that the fact, whether or not this defendant is clerk of the peace as well as town-clerk of the borough, may be more distinctly before the Court.

Holroyd, J.—I am also of opinion that there ought to be a new trial in this case. I think the parol evidence tendered was rightly rejected, because it appears to me, not to have been offered merely to explain any latent ambiguity, for I see none in the instrument, but to restrain the sense of the agreement from what it would import if taken by itself. With respect to the other points, I think there is upon the record, even as it now stands, a considerable question whether, with regard to the nature of the town-clerk's office only, independently of his being clerk of the peace, this is, or is not, a valid contract. But assuming there to be a sufficient legal objection in that respect, it will be far more satisfactory to have a new trial, in order that the question may be more distinctly brought under consideration as to the fact of the defendant himself being clerk of the peace of the borough-sessions, both as it regards not merely the persons recommended, but as it relates to the inducement to recommend prosecutions when they might not perhaps otherwise be proper to be instituted. In this question may be involved the consideration, whether the defendant may derive advantage from a present gratuity, or may receive hereafter more permanent advantages, so as to influence his judgment in recommending particular prosecutions, instead of being left to the honest, fair, and unbiassed exercise of his official duties. It is fit that these matters should be fully considered upon the record, when the facts are fully established, so as to raise the question. I think the defend-

ant is not concluded by the omission to take the objection to the legality of the agreement at the last trial.

Abbott, C. J. was sitting at Nisi Prius, and Littledale, J. was absent.

Rule absolute for a new trial, the costs of the first to abide the event of the second trial.

The King v. The Inhabitants of Oxfordshire.

Where turnpike trustees erected a bridge, in pursuance of the powers given them by the act, upon a road where there had been no bridge before:—Held, that the county was primarily liable to keep it in repair, even assuming that the trustees had funds in hand applicable to that purpose.

THIS was an indictment found at the *Michaelmas* Quarter-Sessions, 1823, for the county of *Oxford*, and removed by certiorari into this Court. It came on to be tried before *Park*, J. at the last *Summer* Assizes for the county of *Gloucester*, when it was agreed that a verdict should be entered for the Crown, subject to the opinion of the Court upon the facts which appear on the pleadings which follow: The jurors for our lord the king upon their oath present, that there is, and for divers (to wit) forty years last past hath been, a certain public and common bridge, commonly called *Fisher's* Bridge, lying and being in the parish of *Bampton* in the said county of *Oxford*, in the king's common highway there, leading from the town of *Bampton* aforesaid towards and unto the village of *Buckland* in the county of *Berks*, for all the liege subjects of our said lord the king and his predecessors, by themselves, and with their coaches, horses, carts, and carriages, to go, return, pass, repass, ride, and travel at their pleasure, and, that the said public and common bridge heretofore (to wit), on &c. and from thence continually afterwards, until the day of the taking of this inquisition, at the parish aforesaid in the said county of *Oxford*, was, and yet is, in great decay, broken, and ruinous, for want of due reparation and amendment of the same, and also insufficient, inconvenient, narrow, and incommodious

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for the public, so that the liege subjects of our said lord the king, upon, and over the said bridge, by themselves, with their coaches, horses, carts, and carriages, could not, during the time aforesaid, nor yet can, go, return, pass, repass, ride, and travel, without great danger, to the grievous damage and common nuisance of all the liege subjects of our said lord the king, upon and over the same bridge going, returning, passing, repassing, riding, and travelling, and against the peace of our said lord the king, his crown and dignity; and that the inhabitants of the said county of *Oxford*, the public and common bridge aforesaid, so as aforesaid, being in decay, insufficient, inconvenient, narrow, and incommodious, ought to repair and amend, when and so often as it should or shall be necessary. Plea, and H. T. and V. J. S., two of the inhabitants of the said county of *Oxford*, for themselves and the rest of the inhabitants of the said county, except the trustees appointed in or by virtue of the several acts of parliament hereinafter mentioned, by P. D. their clerk in Court, having heard the said indictment read, say, that they and the rest of the inhabitants of the said county, except as aforesaid, ought not, by reason of the premises, to be further prosecuted, because they say, that by a certain act of parliament made and passed in the 17th year of the reign of his late majesty King *George the Third*, intitled, "An Act for amending, widening, and keeping in repair, the road leading from the turnpike-road, in the parish of *Asthal* in the county of *Oxford*, to the turnpike-road at or near *Buckland* in the county of *Berks*," after reciting that the road leading from the turnpike-road in the parish of *Asthal* in the county of *Oxford*, through the town of *Brize-norton* to the turnpike-road, which leads from *Witney* to the Market Cross in *Bampton* in the said county, and along the said turnpike-road, for the distance of one mile and a half, and thirteen chains, or thereabouts, and from thence over the meadows and over the river *Isis* at or near *Kents Weir* to the turnpike-road at or near *Buckland* in the county of *Berks*, being the nearest road from the said turnpike-road

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in the parish of *Asthal* to *Buckland* aforesaid, was in many parts narrow, and out of repair, and in some places subject to be overflowed, and was frequently impassable for carriages, and passengers, and it would be very advantageous to all persons having occasion to make use of the said road, if the same was properly amended, and raised, widened, turned, and altered where necessary, and proper bridges and arches erected and built, in the course of the same, so as to make the said road passable and safe at all times, it was enacted, That out of the money arising by the tolls which should be collected by virtue of that act, or out of the first money which should be borrowed on the credit thereof, the said trustees or any five or more of them, should, in the first place, pay and discharge all the charges and expenses of obtaining and passing that act, and should apply the remainder of the money, so raised, in erecting gates or turnpikes, and toll-houses, and in amending, widening, turning, altering, and repairing, the said road, and in defraying the necessary costs, charges and expenses attending the same and the execution of that act, and in making such other payments as are thereinbefore directed, and to such other purposes as are thereinafter mentioned, and to no other use or purpose whatsoever. And it was further enacted, that the said trustees, or any five or more of them, be thereby fully authorized and empowered to cause to be made, raised, opened, repaired, and kept in repair, all such causeways, ditches, and drains, and also all such mounds, banks, drains, sluices, or other water-works, in, upon, or under the said road, and also in and upon any place or places, and through any grounds, convenient for such purposes, and also to widen, turn and alter the course or path of any part of the said road, by carrying the same through any grounds of any person or persons lying contiguous thereto, or by laying any part of such grounds into the said road, as the said trustees, or any five or more of them, should think necessary, for the better repairing, widening, straightening, draining, and amending, the said road, and

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keeping the same in repair, and also *to build, erect, repair, and keep in repair, any bridge or bridges*, arch or arches, mounds, and banks, with or without trenches or gutters through or under the same, upon any part or parts of the said road, and across any stream, brook, water-ditch, or drain therein contiguous thereto or affecting the said road, making such recompense to the owners and occupiers of the private grounds respectively, for the damages they should or might sustain thereby, as should be judged reasonable by the said trustees or any five or more of them, and for that purpose, to agree with the several owners, proprietors of, and persons interested in, any lands or hereditaments, for the purchase of any such lands or hereditaments, or for the loss or damage such owners, proprietors, occupiers, and persons interested, or any of them, should or might any ways sustain, by widening, turning, or altering the course or path of any part or parts of the said road, or for such other works as aforesaid, and out of the tolls by this act granted, or out of any money to be borrowed on the credit thereof, to pay for such lands or hereditaments, and for such loss or damage, such sum or sums of money as should be agreed upon between such owners, proprietors, and occupiers, and persons interested as aforesaid, and the said trustees, or any five or more of them; and also the costs and charges attending such agreement and purchase. And it was further enacted, that when any particular part of the said road, *or any bridge*, dam, stank or bank, drain or sewer, being in, upon, or near the said road thereby intended to be repaired, or whereby the same might be overflowed or damaged, had been accustomed, or ought to be repaired, and maintained by any particular person or persons, bodies politic or corporate, by reason of the tenure of any lands, tenements or hereditaments, or by the said county of *Oxford* or *Berks*, or any township, parish or division therein, every such part of the said road, or such bridge, dam, stank or bank, drain or sewer, so lying in, upon, or near the said road, should, from time to time, be maintained and kept in repair by such per-

son or persons, body corporate or politic, county, township, parish, or division, and in such manner as the same were respectively maintained and kept in repair, before the passing of this act. And it was further enacted, that that act, and the tolls or duties, and the several powers and authorities thereby granted, should commence and have continuance from and after the 5th day of *May*, 1777, for and during the term of twenty-one years, and from thence to the end of the then next session of parliament. And the said defendants further say, that by a certain other act of parliament, made and passed in the 39th year of the reign of his said late majesty, King *George the Third*, intitled an Act to continue for twenty-one years, and from thence to the end of the then next session of parliament, the term and powers of an act passed in the 17th year of the reign of his then present Majesty, intitled "An Act for amending, widening and keeping in repair the road leading from the turnpike-road in the parish of *Asthal*, in the county of *Oxford*, to the turnpike-road at or near *Buckland*, in the county of *Berks*," it was enacted that the term of the said first mentioned recited act should, from and after the passing of this act, cease and determine, and that the said act, subject as thereinbefore mentioned, and this act, should from thenceforth continue, and be in force, and be executed for and during the term of twenty-one years, and from thence to the end of the then next session of parliament. And the said defendants further say, that by a certain other act of parliament, made and passed in the first year of the reign of his present majesty King *George the Fourth*, intitled "An Act to continue the term and alter and enlarge the powers of two acts of his late majesty King *George the Third*, for amending the road leading from the turnpike-road in the parish of *Asthal*, in the county of *Oxford*, to the turnpike-road at or near *Buckland*, in the county of *Berks*," reciting that an act was passed in the 17th year of the reign of his late majesty King *George the Third*, intitled an Act for amending, widening and keeping in repair the road leading from the turnpike-road in the

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parish of *Asthal*, in the county of *Oxford*, to the turnpike-road at or near *Buckland*, in the county of *Berks*, and also reciting that another act was passed in the 39th year of his said Majesty, intitled "An Act to continue for twenty-one years, and from thence to the end of the next session of parliament, the terms and powers of an act passed in the 17th year of the reign of his then present Majesty, intitled, an Act for amending, widening and keeping in repair the road leading from the turnpike-road in the parish of *Asthal*, in the county of *Oxford*, to the turnpike-road at or near *Buckland*, in the county of *Berks*," it was enacted that this act should commence and take effect from the passing thereof, and that the said recited acts, subject to the alterations and amendments therein contained, and this act, should continue and be in force, and be executed, for and during the residue now to come and unexpired of the term granted by the said recited acts, and from the expiration thereof, for and during the further term of twenty-one years, and from thence to the end of the then next session of parliament. And the said defendants further say, that after the passing of the said first mentioned act of parliament, and under and by virtue thereof, (to wit) on the 1st day of *January*, 1778, at the parish of *Bampton* aforesaid, in the said county of *Oxford*, the trustees appointed in and by virtue of the same act, did first build and erect the said bridge in the said indictment mentioned, and from the time of the said bridge being so built and erected by them, they, the said trustees, hitherto have repaired and kept in repair, and have been liable to repair and keep in repair, and during all that time, and still of right ought to have repaired and kept in repair, the said bridge, when and so often as occasion hath required, or shall require. And this they the said defendants are ready to verify. Wherefore &c. And *E. H. Lushington*, Esq. coroner and attorney of our said lord the King, who prosecuteth &c. having heard the said plea of the said defendants for themselves and the rest of the inhabitants of the said county, except as in the said plea in that behalf excepted, pleaded,

saith on behalf of our said lord the King, that the said inhabitants of the said county, except as in the said plea is in that behalf excepted, by reason of any thing in that plea above alleged, ought not to be dismissed or discharged of or from the premises in the said indictment contained, because the said coroner and attorney, on behalf of our said lord the King, saith that the said trustees in the said plea mentioned, from the time of the said bridge being so built and erected by the said trustees as in the said plea is mentioned, hitherto, have not been liable to repair or keep in repair, nor during all that time, nor still of right ought to have repaired or keep in repair, the said bridge, when and so often as occasion hath required, or shall require, as in the said plea is above alleged, and this the said coroner and attorney for our said lord the King prays may be inquired of by the country. On this replication issue was taken. If the Court shall be of opinion, on the matters which appear on these pleadings, that these defendants are liable to repair, then judgment is to be entered for the Crown; otherwise, for the defendants.

G. Cross, for the defendants, was desired to begin. The inhabitants of the county of *Oxford* are not liable to repair the bridge in question; the burden lies upon the commissioners, under the operation of the acts of parliament upon which the plea is founded. It is not denied that, by the common law, counties are chargeable with the repair of public bridges, unless it be shewn, as the statute 22 *Hen.* 8. c. 5. says, "what persons, lands, tenements, and bodies politic, ought to make and repair such bridges." Undoubtedly, in the absence of such proof, that burden is, by the operation of the common law, thrown upon the inhabitants of the county in which the bridge lies. The question then is, whether the bridge now indicted is not taken out of the common law principle by operation of the statute under the authority of which it was erected. Before the passing of that act, it appears there had been no bridge in existence at the spot in question, although there had been a road. By

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the 17th *Geo.* 3. an act for amending the road leading from *Asthal*, in *Oxfordshire*, to *Buckland*, in *Berkshire*, after reciting that it would be advantageous to all persons having occasion to use that road if it was properly amended, *and proper bridges and arches* erected in the course of the same, so as to make the said road passable, enacts, that the money arising from the tolls collected by virtue of that act, should be applied, first, in defraying the expenses of obtaining the act, and then the remainder in erecting gates, &c. and defraying the expenses attending the *execution of the act*. And then the trustees are empowered, amongst other things, "to *build, erect, repair, and keep in repair* any bridge or bridges," &c. upon any part of the road. This bridge having been erected under the authority here given, the obligation of keeping it in repair necessarily lies upon the trustees by operation of the words just cited. A primary liability is thus thrown upon them, and they have no right to cast the burden of repairing on the county at large. It will be said on the other side, that though the bridge was originally erected out of the funds collected under the turnpike act, still the trustees have no funds to keep it in repair, and consequently they must resort to the county. But the onus probandi lies upon them to shew that they have no funds. That fact ought to have been stated by them upon the record. It is sufficient for the defendants to make out a primary liability in the trustees, and it is for the latter to establish that they have no funds. Non constat, that they have not means abundantly sufficient to keep the bridge in repair, and at all events they cannot resort to the county until they shew that their funds are exhausted. Here is a bridge erected out of a fund created for the purpose, which, for any thing that appears to the contrary, is sufficient to keep it in repair. It would be extremely hard upon a county, after a bridge has been built, under such powers as are contained in this act of parliament, to be told that the funds of the trustees have become inadequate to keep it in repair, and that the inhabitants of the county must be made liable. That part of

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the act of parliament which declares "that when any particular part of the road or *any bridge*, &c. had been accustomed to be repaired by other persons ratione tenuræ, or by the counties of *Oxford* or *Berks*, &c. every such part of the road, or such bridge, should be kept in repair by such persons, county, &c. in such manner as the same were respectively maintained before the passing of the act," does not apply to the bridge in question. The effect of that clause is merely to shew that nothing was intended by the act to alter any pre-existing liabilities; but it was not intended thereby to throw upon the county any new liability. The object of the act was to create a fund for the purpose of building new bridges, and exonerating the county from any expense of repairs. This being a new bridge erected under the authority of the act, there could be no pre-existing liability to keep it in repair, and that liability could not be created after the bridge was erected. If the trustees have not funds to keep the bridge in repair, it is competent for them, under the powers of the act, to raise as much money by additional tolls, or by borrowing, as is necessary for that purpose. This is the first case in which the Court has been called upon distinctly to decide, that where trustees of a turnpike-road are empowered to erect new bridges out of a fund created for that purpose, the obligation to keep such bridges in repair devolves upon the county. Such a principle, if it is recognized, will operate as a great hardship upon counties. It is not easy, however, to understand the justice of the principle by which trustees are empowered to erect as many bridges as they may think proper out of a fund which they have authority to raise for that purpose, and then cast the burden of repairing them on the county. This case is distinguishable from those which will probably be cited on the other side, for in them there was a primary liability to repair shewn in the county. Here it is submitted that the primary liability lies on the trustees. This case cannot be governed by *Rex* v. *The West Riding of York-*

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shire (*a*), because there the act of parliament gave no power to the trustees to erect bridges, and therefore the tolls could not be applicable to mee the expense of repairs. Here there is a special obligation and duty thrown upon the trustees; first, to make, and then to maintain the bridge. This is not like the case of *Rex* v. *The West Riding of Yorkshire* (*b*), because the proposition there laid down is not disputed, namely, that if a private person build a bridge, which afterwards becomes a public convenience, the county is bound to repair it. There the common law liability comes into operation; but not so here, for here the primary liability is in the trustees. Upon the whole of the record, therefore, and it not appearing that the trustees have no funds to repair the bridge, it is submitted that the defendants are entitled to judgment. He cited *Rex* v. *Kent* (*c*) and *Rex* v. *Lindsey* (*d*).

Twiss, contrà. Primâ facie the whole liability to repair public bridges lies upon the county, and therefore the affirmative of taking this case out of the general rule of law lies upon the defendants, not upon the prosecutor. It is stated on the pleadings that there had been an old road passing over the Isis, before the passing of the 17 *Geo.* 3. and for any thing that appears on the face of the defendant's plea to the contrary, there may have been, and probably was, an old bridge in the place where the bridge in question is now erected. The general principle is admitted on the other side, that where a bridge is built by a private individual and dedicated to the use of the public, and the public adopts it, the county is liable to keep it in repair. That principle is strongly applicable to, and illustrative of the case at bar, though the strength of the argument lies in the language of the act of parliament set out in the plea. The statute recites the public advantage of building bridges on the road in question, and the trustees are therefore empowered, for the

(*a*) 2 East, 342.
(*b*) 5 Burr. 2594. 2 Bla. 685.
(*c*) 13 East, 220.
(*d*) 14 Id. 317.

sake of the public advantage, to erect new bridges where they are necessary. This bridge has been erected by virtue of the power thus given, it has been adopted by the public, and the question is, whether the inhabitants of the county can throw off their primary common law liability to keep it in repair. Now it is perfectly clear upon principle, as well as decided cases, that the common law liability of the county to repair a new bridge dedicated to and adopted by the public, can not be devested, because the trustees have erected it under the authority of an act of parliament. It is true that the trustees are empowered to raise money by borrowing, or by tolls, and that the money when raised is to be applied, amongst other purposes, to the erection of necessary bridges; but it is erroneously assumed on the other side, that part of the money is to be applied to the keeping of the bridges in repair. After defraying the expenses of obtaining the act, the trustees are to apply "the remainder of the money so raised in erecting gates or turnpikes, and toll-houses, and in amending, widening, turning, altering, and *repairing the said road*;" but there is no direction whatever for applying any part of the money to the reparation of the bridges. It is argued on the other side, that because the tolls are to be applied to the repairs of the road, therefore they are to be applied also to the repair of the bridges; but that is clearly not so. If the argument for the defendants were to prevail, it would go to exempt the different parishes through which this road runs, from their common law liability to repair. The liability to repair [illegible] lations of a turnpike act, that the liability of the parish at common law ceases. There is no doubt that the trustees are bound to apply the tolls to the reparation of the road but if their funds fail, the parish is liable to make good the deficiency. The tolls collected under this act, are only an auxiliary fund to relieve the parish from that expense to which they would by law be otherwise liable, for repairing

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the road; but if the tolls be insufficient for the purpo then the common law liability of the parish may be resor to. This was solemnly decided in *Rex* v. *Netherthong* (the principle of which is decisive of the present ca There a local turnpike act, after empowering the trustee under it to take tolls, directed that the roads should fro time to time be repaired by the trustees out of the mone arising by virtue of the act; and it was held, that this onl made the tolls an auxiliary fund in the hands of the truste and that the inhabitants of the township where the roa was situate, who by prescription were bound to repair a the roads within it, were nevertheless liable to be indicted fo not repairing the road. But then it is said to be incum bent on the trustees to shew a want of sufficient funds t repair the bridge. This is reversing the whole order of th respective liabilities of the parties. It is not upon th trustees, but upon the county that the primâ facie liabilit lies. To exempt the county from that liability a specia case must be made out; but this is not that case. [Her the Court stopped him.]

Bayley, J.—This is an indictment against the county fo not repairing a bridge in a highway, and by the statute 2 *Hen.* 8. c. 5. the obligation of repairing bridges upon high ways is primâ facie cast upon the county at large; and i that respect it is exactly analogous to the obligation o parishes to repair their own highways. This being a bridg in a highway, and used by the public, we are to see, whe ther there is any thing in this case which exempts the county at large from the obligation of being called upon, in the firs instance, to put the bridge in a proper state of repair. Th plea suggests the different circumstances which are to ex onerate the county from the obligation; and I take it to be clear that the county can never be exonerated from its obli gation unless there is an obligation expressly thrown on somebody else. The plea sets out a road act for public

(a) 2 B. and A. 179.

purposes,—not for the private benefit of individuals, but for public purposes,—in order that convenience may be rendered to the public in passing along the line of road intended to be repaired; and, amongst other things, it authorizes the trustees to erect bridges. The county at large would (if no authority was given by act of parliament to particular persons of making bridges in a highway) have the opportunity of opposing the erection of a particular bridge in the highway, and of restraining their liability to keep it in repair; but if there be an act of parliament for the purpose, then it supersedes the right which the county would have of preventing the building of the bridge. Unless, however, the act of parliament makes a special provision so as to exempt the county at large from its common law obligation of keeping the bridge in repair, that obligation still attaches. The county is bound at common law to keep in repair a bridge, erected under such authority, unless there is, upon the face of the statute, an express exemption in its favour, throwing the primary liability upon other persons. Here there is no express exemption. There is no direction in the statute, substituting or making any other persons primarily liable so as to exonerate the county. The act authorizes the trustees to collect tolls to a certain amount, and it points out a variety of different purposes to which they are to be applied, but there is no express direction for applying any part of them to the reparation of bridges. They are, in the first place, to "pay and discharge all the charges and expenses of obtaining and passing the act, and shall apply the remainder of the money so raised in erecting gates or turnpikes, and toll-houses, and in amending, widening, turning, altering, and repairing the said road, and in defraying the necessary costs, charges, and expenses attending the same, and the execution of the act, and in making such other payments as are hereinbefore directed, and to such other purposes, as are hereinafter mentioned, and to no other use or purpose whatsoever." There is, therefore, in this clause, no express direction to apply any of the money towards the repair of

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bridges erected under the authority of the act. But it is contended, though there are no express words directing the trustees so to do, yet they are, notwithstanding, liable to apply the tolls in that way. Now I will assume for the present that they are under that obligation; but still, in order to exonerate the county, the defendants ought to have alleged in their plea, and proved at the trial, that the trustees had at that moment sufficient funds in order to have done those repairs, the expense of which would otherwise have attached on the county at large. Even, however, if that could be proved, it would not be an answer to this indictment, because, unless the act of parliament has made the trustees primarily liable, the common law obligation in the first instance attaches upon the county. If, indeed, the trustees have funds which are available for this purpose, the county has a right to look to those funds and see that they are properly applied; but the common law obligation attaches to the county in the first instance. The cases of *Rex* v. *The West Riding of Yorkshire* (a), and *Rex* v. *Netherthong* (b), are plain and direct authorities on this point. In the first case, a bridge was made by the trustees under the authority of the road act. The county, therefore, had no opportunity of resisting the building of that bridge; they had the bridge forced upon them; but the Court was of opinion that they still came under the obligation of repairing it whenever from time to time it required repair. Then as to the case of *Rex* v. *Netherthong*, if we merely substitute the words "county," for "township," and "bridge," for "road," it is precisely in point with the present. There the road was made in pursuance of an act of parliament, and there was a much more express provision in the act than here; for there was there a distinct direction that the trustees should from time to time repair the road out of the money collected by the tolls. Notwithstanding that, upon an indictment against the township for not repairing the road, it was held, that as the township stood in the place

(a) 2 East. 342. (b) 2 B. and A. 179.

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of a parish, and as parishes were liable in all parts of the kingdom to repair their own roads, the indictment was well brought. The cases of *Rex v. Kent* (a) and *Rex* v. *Lindsey* (b), though they to a certain degree bear on this, yet are distinguishable from it. In each of those cases there was a ford crossing a river which had been passable for the public. An act of parliament passed in each, giving to the navigation companies power to apply the water of the streams to their own purposes, as they thought necessary, and to erect such bridges as they deemed requisite. They erected bridges over places where there had been fords, and destroyed the fords. In consequence of their neglecting to repair the bridges so erected, indictments were preferred against the counties. "No," said the Court, "the counties are under no obligation to repair these bridges. They were not erected for the benefit of the counties, nor for any public purpose whatever; but, for the private purposes of the navigation companies respectively; and therefore, all the obligation that lies upon the counties, is to restore the fords to the state in which they were. But if you want the bridges repaired, you must indict the trustees under the acts of parliament by which they have substituted the bridges in lieu of the fords for their *own purposes*." Upon general principles, therefore, as well as respects the provisions of this act of parliament, I think the obligation of repairing this bridge lies upon the county of *Oxford*, and, therefore, there must be judgment for the crown.

Holroyd, J.—I am of the same opinion. The last two cases referred to by my brother *Bayley* are distinguishable from the present. In those, the bridges were built for the private purposes and benefit of the trustees. It is true that when built they were used by the public, but the object of building them being for private advantage, the Court held the counties not liable to keep them in repair. In this case, the bridge is not built for any private object, but expressly

(a) 13 East, 220. (b) 14 Id. 317.

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for the benefit of the public. I am, therefore, of opinion, that the moment the bridge in this instance was built by the trustees, the common law liability of the county attached to keep it in repair. I apprehend the principle applicable to parish roads is equally in point with county bridges. Although trustees may be appointed to keep a turnpike road in repair, and have tolls which they are bound to apply to that purpose, yet those tolls are merely in aid of the parish, and that obligation upon the trustees does not supersede the liability of the parish at common law to keep the road in repair. The only question in such cases is, whether the road is a public highway, for if it be, the parish is primarily liable, though the tolls collected under the turnpike act are applicable in aid of the parish. The act in this case gives the trustees power to raise money by tolls, but they are not liable beyond the amount which they may lawfully collect, nor indeed are they bound to lay out all they collect, assuming, that they can with propriety apply the tolls to other purposes beside repairs. All the cases go to this, that if there be no direct obligation substituted for that, which by law attaches to the parish in the case of a highway, or to a county in the case of public bridges, the original primary obligation remains on the parish and the county severally and respectively. In an anonymous case in Lord *Raymond's* Reports (*a*), it is laid down by Lord *Holt*, that if particular persons are made chargeable to the repairs of highways by a statute lately made, and become insolvent, the justices of the peace may put that charge upon the rest of the inhabitants. That doctrine is strongly applicable to this case, although not the case of a bridge. So in *Rex* v. *Sheffield* (*b*), which is a stronger case, it was held, that if the inhabitants of a township, bound by prescription to repair the roads within the township, expressly be exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall upon the rest of the parish.

(*a*) 2 Lord Raym. 725. (*b*) 2 T. R. 106.

Upon the principle of those cases, and relying also upon the doctrine in *Rex* v. *The West Riding of Yorkshire* and *Rex* v. *Netherthong*, I am of opinion, that the primary obligation of repairing this bridge when built, being ipso facto upon the county, and there being no express exemption in this act of parliament, the judgment ought to be entered for the crown.

LITTLEDALE, J.—I think that the liability of the parish to repair roads, and of the county to repair bridges, both stand upon the same footing, and must be governed by the same principle. This is laid down, in several decided cases, the strongest of which is *Rex* v. *Netherthong*, the principle of which is, I think, conclusive of the present question. I am of opinion that the onus does not lie upon the trustees to shew that they have no funds sufficient to repair this bridge. The primary liability to repair is on the county, and if the defendants meant to avail themselves of any funds in the hands of the trustees applicable to that purpose, the fact ought to be expressly alleged in their plea and proved in evidence, although I think that would be no answer in law to this indictment; for, supposing there are funds applicable to such a purpose, they would, according to the principle of *Rex* v. *Netherthong*, be applicable only as an auxiliary fund to the county rate.

Judgment for the crown.

The DUKE of SOMERSET v. The INHABITANTS of the HUNDRED of MERE.

The 9 *Geo.* 1. c. 22. s. 8. requires that *all* the servants having the care of property wilfully destroyed by fire, shall be examined before a magistrate, before the owner can sue the hundred for damage.

Where, in an action on this statute, by the owner of property wilfully destroyed by fire, against the hundred, it appeared that plaintiff's steward, who lived a mile and a quarter from the property, had the general superintendance of it, and several labourers employed under him, worked on the spot, and had the actual care of it, but the steward only was examined before the magistrate:—Held, that the requisites of the statute were not complied with, and that the action was not maintainable.

Quære, Whether a steward is a servant, within the meaning of this act.

[TH]IS was an action on the statute 9 *Geo.* 1. c. 22. to recover a compensation for an alleged wilful and malicious

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destruction of the plaintiff's property by fire. At the trial before *Garrow*, B. at the *Salisbury* Summer assizes, 1824, a verdict was taken for the plaintiff, damages £400, subject to the opinion of the Court upon the following case:

The Duke of *Somerset*, before and at the time of the fires hereinafter mentioned, was the proprietor of *Rodmead Farm*, in the parish of *Maiden Bradley*, in the hundred of *Mere*, and county of *Wilts*. In *November*, 1820, the duke let this farm by indenture of lease, which is to be referred to if necessary as part of this case, for a term of seven years, to *Cornelius* and *Joseph Large*, as joint lessees. *Cornelius* was the actual occupier, and *Joseph* was joined in the lease as a security. The lease has never been surrendered. In *February*, 1822, a distress was made upon the premises for rent; and shortly afterwards *Cornelius Large* left the farm, and never afterwards returned to occupy it. Upon his departing, *Joseph Large* entered upon the occupation, having purchased, for about £800, nearly the whole of the goods upon the premises, under that distress. On the 28th *May* some person claimed the interest in the premises as provisional assignee of *Joseph Large*, and took possession, and *Joseph Large* acted under him. In the middle of *June*, however, *Joseph Large* also left the farm, and never afterwards returned to occupy it. *Joseph Large* departed in the middle of the hay harvest, leaving an arrear of wages due to his labourers, when *Michael Fesling*, the duke's steward, who lived about a mile and a quarter from *Rodmead Farm*, in order to secure the produce, gave directions to one *Neate*, the under-steward, to pay the labourers the arrears due to them, and continue to employ them in the hay-making, which was completed under his directions, and at the expense of the duke. The persons so employed and paid by the duke's steward, used the stables in the farm with their teams and horses. The hay having thus been harvested, on the night of the 29th of *June*, a barn with three floors, a range of stables, a range of cart-houses, a

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range of sheds for cattle, several out-houses and pig-sties, altogether of the value of much more than £200, together with straw in the barn, the produce of the farm during *Large's* occupation, to the value of £45, and a threshing machine erected by the duke, and demised with the premises, were consumed by a fire, which the jury found was wilfully and maliciously lighted by an unknown incendiary. Within two days after the fire, the duke's steward gave to three inhabitants of the parish of *Maiden Bradley*, the notice required by the statute, and within four days after the fire, gave in his examination on oath to a magistrate of the county, residing at *Westbury*, about eight or nine miles from *Rodmead*, but not in the hundred of *Mere*, as the nearest magistrate that could then be got by the said *M. Festing*. By the lease to the *Larges*, the straw raised on the farm was to be consumed on the premises, and what was unconsumed at the expiration of the term was to be left on the farm; and the *Larges* were also under covenant to repair, and leave in repair the premises, without any exception in respect of damage done by fire. The *Larges* never having returned, the duke's steward, on the 8th of *July*, distrained for rent due at *Midsummer*, and gave a notice of distress, in which the farm and lands were stated to be then in the possession of the *Larges*, as tenants of the farm; which notice, if necessary, is to be referred to as part of this case. Under that distress he took all the produce of the farm, consisting chiefly of growing crops, which were subsequently harvested on the premises, under his directions, and at the expense of the duke, but no further steps were taken with respect to the goods and crops so taken as a distress as aforesaid. A staddle barn was filled with wheat, of which there was a also a separate rick, and the labourers employed had, as before, the use of the stables. At the respective times of the said fires the house was locked up, and the *Larges* had the key, and there were some cheesevats belonging to them in the house. The premises, being in other respects unoccupied, were, on the night of the 15th of *September*, again

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wilfully and maliciously set on fire by an unknown incendiary; when the staddle barn, worth about £250, seventy stacks of threshed wheat lying therein, part of the produce of the distress, and worth £70, a wheat rick, part of the produce of the distress, and worth £100, a heap of straw in the farmyard, part of the produce of the distress, and worth £4 : 10s. were entirely consumed. Within two days after the fire the duke's steward gave notice thereof to the inhabitants of *Maiden Bradley* aforesaid, and within four days after the fire gave in his examination upon oath before Sir *Richard C. Hoare*, Baronet, a magistrate of the county, inhabiting within the said hundred of *Mere*. The incendiary was never discovered, and this action was commenced more than six, and within less than twelve months, from the time of both fires.

Bingham, for the plaintiff. The question now before the Court depends upon the construction which they will give to the 7th and 8th sections of the act of parliament, with reference to the peculiar facts of this case; and in order to sustain his action, the plaintiff must make out two propositions: first, that he had a legal interest in all the property destroyed at the time of its destruction, and second, that he has given in a sufficient notice and examination, pursuant to the statute. First, as to the plaintiff's interest in the property. This statute is remedial as well as penal, and the remedial parts, therefore, are to be construed liberally. It does not define the interest which it requires a party seeking redress under its provisions to have; it says merely that every person who shall sustain damage shall be entitled to a remedy. The plaintiff has sustained damage, therefore the precise nature of his title to or interest in the property is immaterial. He was cultivating the farm at the time of the fire. The destruction of the barns has compelled him to hire others, that is a damage; the sale of the crops seized under the distress has been postponed, that is a damage; and the jury by their verdict have found that he has sustained

damage. Second, as to the notice and examination. And here three questions arise: first, whether the property destroyed was the plaintiff's property; second, whether the person who gave in the examination before the magistrate was the plaintiff's servant; and third, whether that person had the care of the property. Now the property destroyed must have belonged to the plaintiff, or he could not have sustained damage, and the jury must have been satisfied that it did, or they would not have given him damages. But as against a wrong-doer it was clearly his, for as against a wrong-doer any man may call that property his own of which he has the bare possession, however tortious, and to which the wrong-doer shews no title, *Cary* v. *Holt* (*a*). In this point of view every landlord's premises are his own, as well as his tenant's. If the plaintiff had been able to prosecute the offenders in this case, he could not have described the buildings in the indictment as the property of the tenants, who had deserted them; he must have described them as his own: because he having retaken possession, the property was not in them, but in him. *Armorie* v. *Delamirie* (*b*), *Drayton* v. *Dale* (*c*), and *Hall* v. *Pickersgill* (*d*), are all authorities in support of that rule of pleading, and all therefore support the principle now laid down. But there is one case of *Coombs* v. *Bradley* (*e*), decided upon the statute of *Winton* (*f*), which seems in pari materiâ and fully in point with the present. There, "in an action against the hundred, the plaintiff declared that he was possessed, ut de bonis propriis suis, &c. The jury found the plaintiff was a servant, and was robbed upon the road of 30*l*. of his master's money, and 20*s*. of his own. Et per Cur. The action well lies by the servant, for the money is his, and he is possessed ut de bonis propriis against all, and in respect of all but him that hath the very right." The corn distrained for rent was certainly somewhat in a different situation from the build-

(*a*) Stra. 1238. (*b*) Stra. 505. (*c*) Ante, vol. iii. 594.
(*d*) 1 B. & B. 282 S. C. 3 J. B. Moore, 612.
(*e*) 2 Salk. 613. S. C. 4 Mod. 303. Comb. 263. (*f*) 13 Ed. 1. c. 1

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ings; but if that was not the plaintiff's property, whose was, or could it be? It was distrained on his account, and was in his possession, and must have been described as his property in an indictment, if it had been stolen. Then the person who gave in the notice and examination was the plaintiff's servant, and had the care of the premises, within the meaning of the act. He was the steward, and a steward is in all respects a servant, for he receives wages, takes orders, and performs services. He had also the care of the premises. It is peculiarly the office and duty of a steward to have the care and management of his master's premises. The case finds that he resided about a mile and a quarter from the spot where the offence was committed; but that is immaterial, for he had the care of the whole estate, and so he swore in his examination. Upon both points, therefore, it is submitted that the plaintiff has made out his right to maintain this action.

Campbell, contrà. There is certainly a material distinction between the buildings and the corn, but the plaintiff has no right to recover in respect of either. He had no possible interest in the buildings at the time of the fire, for he had granted a lease of them, which was then unexpired, and which had not been surrendered either in fact or in law. He was only the reversioner, and if he was in possession, he was in as a trespasser. The tenant indeed had left the farm, but he had taken the key of the house with him, which he retained up to the time of the fire, though he might have returned it at any moment if he had intended to relinquish possession. The steward, therefore, had no authority to do the acts which he did, for the tenant was as much in the legal possession of the house as if he had continued in the actual occupation of it. [*Bayley*, J. It has been held that an action is maintainable by a reversioner, or a trustee, under the 1 G. 1. st. 2. c. 5. for damages for the riotous demolition of a house (a).] It has certainly been

(a) Vide *Jesser* v. *Gifford*, 4 Burr. 2141. and *Pritchet* v. *Waldron*, 5 T. R. 14.

so held with reference to that statute, but there is no similar decision upon the 9 *G.* 1. c. 22. now under consideration. If the tenant had continued in the actual occupation of the farm, it is quite clear that this plaintiff could not have maintained this action, and that the tenant might. The 7th and 8th sections, when read with reference to each other, seem plainly to confine the remedy to the occupier. The lease granted by the plaintiff contained a covenant to repair; the tenant therefore was liable to the plaintiff to make good all the damage done on this occasion, and if so, the plaintiff in effect sustained no damage. *Coombs* v. *Bradley* is very distinguishable from the present case, for there the servant had the legal possession of the property, but here the legal possession was not in the plaintiff but in the tenant, and the property must have been laid to be in the latter if a prosecution had been instituted against the incendiaries. But even if the plaintiff might maintain an action as reversioner, still he must sue as reversioner, and he cannot support this declaration which describes him throughout as the present possessor and actual occupier of the premises. [*Holroyd*, J. Did not the plaintiff's act of taking possession of the farm operate as a suspension of his right to rent from the tenant? Because, if it did, his possession, though wrongful, is still a good possession as against a wrong-doer.] At all events the plaintiff cannot recover in respect of the corn burned at the second fire. That had been distrained under the 11 *G.* 2. c. 19. and was in custodiâ legis; the plaintiff, therefore, had no possession of or property in it, for the distress does not alter the property, so as to take it from the tenant and give it to the landlord, *Moore* v. *Pyrke* (*a*). By the 2 *W.* & *M.* sess. 1. c. 5. s. 2. the plaintiff had authority to sell this corn under the distress, but that was all; the property still remained in the tenant, and the possession was in the law; for a landlord who had distrained goods has no property in them, and cannot maintain trover for them, *Moneux* v. *Goreham* (*b*). The 9 *G.* 1. c. 22. gives no remedy for

(*a*) 11 East, 51.
(*b*) 2 Selwyn's N. P. 1196. 3d Ed. MS. Case.

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consequential damages, therefore the plaintiff is not entitled to any remedy for the damage occasioned by the postponement of the sale. Then, the notice and examination given in by the plaintiff's steward do not satisfy the requisitions of the act. It must be admitted that a steward is a servant, though he can hardly be called a menial servant, which is clearly what the legislature meant to designate. Assuming, however, that he is, in the general sense of the word, the servant of the plaintiff, and admitting, therefore, that the notice given by him would be sufficient; still he certainly was not the servant who had the care of the premises, and therefore the examination given by him most clearly will not suffice. It is said, he swears that he had the care of the premises, but his oath is not evidence upon that point here. He lived far from the spot; he had no actual, and constant and personal care of the premises or property: he was only the superintendant of other persons who had, and who therefore ought to have been the parties examined. The servants examined must be those who have the actual care of the property, and who by their constant proximity to it have the best means of knowledge of the circumstances of the fire and the persons of the incendiaries. [*Bayley*, J. Must not the offence originate in malice against the party suing, in order to support the action?] Undoubtedly it must, and it has been recently so decided, *Curtis* v. *The Hundred of Godley* (*a*). There is nothing to prove, or to raise the presumption of malice against the Duke of Somerset in this case; the malice, if any, must have been against the tenant. [*Bayley*, J. There is also another difficulty. I think it has been held that where there are more servants than one in the care of property wilfully burned or destroyed, they must be all examined before the magistrate: if so, as there were evidently more than one in the care of this property, and only one was examined, is not that a fatal objection to the action?] It certainly has so been held; and the objection is clearly fatal in this case.

(*a*) Ante, vol. ii. 419.

Bingham, in reply. There is certainly no proof of malice against the plaintiff, but the facts of the case afford the strongest presumption of it. There is no other person here against whom malice could be felt, and, in that respect, this case differs essentially from *Curtis* v. *The Hundred of Godley*. It is true that there were other servants besides the steward employed upon the premises and upon this very property; but they had no charge of it; no confidence or trust was reposed in them: the steward was the confidential servant, he, and he only, had the care of the property, and he was the only proper person to be examined on the subject. *Nesham* v. *Armstrong* (a) differs from this case, for there several partners were jointly interested in the property, but here the parties not examined are the inferior servants of the one only person who had any interest in the property at all. The present construction of the statute is confirmed by the judgment of *Best*, C. J. in the late case of *Short* v. *Hubbard* (b); and *Crosby* v. *Wadsworth* (c) is an additional authority for saying that the plaintiff here had such a special occupancy as gave him a title against a wrong-doer, and therefore entitles him to maintain this action.

Bayley, J.—Upon the first point, namely, whether the plaintiff had such an interest in the property destroyed, as entitles him to a remedy under the statute, I do not think it necessary to give any opinion, because my judgment is formed entirely upon the second point, namely, the sufficiency of the notice and examination. The object of the proviso in section 8, which makes them necessary, clearly was, that before the injured party should be allowed to bring his action for compensation, he should give, by himself, or his servants, the best proof he could that the offenders were unknown, and that all possible information, tending to the discovery of the offenders, should be obtained from all the

(a) 1 B. and A. 146. (b) 2 Bing. 350.
(c) 6 East, 602. See 1 Inst. 4. b. Fitz. Abr. Tres. 149. Bro. Abr. Tres. 273, and 2 Roll. 1002.

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parties capable of giving it. It was upon this principle that *Nesham* v. *Armstrong*, which was an action upon the 1 G. 1., the words of which are similar to those of the 9 G. 1., was decided, and it was there held, that where more than one person had the care of the house, the examination of one only was not sufficient. That decision applies directly to the present case. One servant only was examined here. The farm was under his superintendance, but the property was in the actual care and custody of other servants employed under him, who resided both by day and night much nearer to the premises than him, and who were, consequently, in every point of view, much more likely to give information, and much more proper to be examined. Upon this single ground, therefore, that the examination of the steward was not an examination of the servants who had the care of the buildings and property, within the meaning of the statute, I am of opinion that the plaintiff cannot maintain this action, and that judgment of nonsuit must be entered.

Holroyd, J.—I am of the same opinion. I think the proviso of the statute has not been complied with either in the letter or the spirit. It seems to me that the only servants who had the care of the property were not examined, for that the steward had only the superintendance of the inferior servants, and had himself nothing like the care of the property. Upon this ground it is quite clear that the action is not maintainable.

Littledale, J.—In order to comply with the terms of the proviso, all the servants who have the care of the property must be examined; here not one of them was examined; for I cannot consider the steward as a servant having the care of the property, either in common parlance, or within the meaning of the act.

Judgment of nonsuit.

WATERHOUSE and others *v.* KEEN.

A turnpike act imposed a toll, first upon every carriage drawn by horses; then upon every horse not drawing; and then upon every drove of oxen or cattle: with a proviso, "that no more than one toll should be taken from any person repassing on the same day with the same horses, cattle, beasts, *and* carriages." Where a stage-coach, drawn by 4 horses, paid the toll in the morning, and in the evening of the same day repassed with the same driver, but with different horses and passengers:—Held, that a second toll was not payable.

ASSUMPSIT, on the money counts. Plea, non-assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after *Michaelmas* term, 1822, the plaintiffs obtained a verdict, damages 17*l.* 2*s.* 6*d.*, subject to the opinion of the Court upon the following case.

The plaintiffs were the proprietors of the *Birmingham Balloon* Coach. The defendant was lessee of certain tolls imposed and continued by several acts of parliament passed for repairing the road from *Dunchurch* to *Stonebridge* in the county of *Warwick*. By the 42 *G.* 3. the former tolls were repealed, and it was provided that the following tolls should be demanded and taken:—

For every coach, berlin, landau, chariot, calash, chaise, chair, hearse, caravan, or litter, drawn by six horses, mares, geldings, or mules, 2*s.*; and drawn by 4 or more horses, mares, geldings, or mules, 1*s.* 6*d.*; and drawn by 2 or 3 horses, mares, geldings, or mules, 1*s.*

For every calash, chaise, or chair, drawn by 1 horse, mare, gelding, or mule, 6*d.*

For every waggon having the sole or bottom of the fellies of the wheels thereof of the breadth of 16 inches, 1*s.*; and of the breadth of 9 inches, 2*s.*

For every wain, cart, or other carriage, having the sole or bottom of the fellies of the wheels thereof, of a less breadth than 9 inches, drawn by 6 or more horses, mares, geldings, mules, or oxen, 2*s.*; and drawn by 4 or more horses, mares,

The same act enacted "that no action should be commenced against any person for any thing done in pursuance of the act, until 21 days notice should be given to the clerk of the trustees, or after sufficient satisfaction or tender thereof made to the party aggrieved, or after six calendar months next after the fact committed; and that every such action should be brought in the county or place where the matter should arise, and not elsewhere; and the defendant should and might at his election plead specially, or the general issue, *not guilty*, and give evidence that the same was done in pursuance and by the authority of that act." In *Assumpsit* against a toll collector, to recover the amount of tolls improperly collected by him;—Held, that the venue should have been laid in the county where the tolls were collected, and that the defendant was entitled to 21 days' notice of action.

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geldings, mules, or oxen, 1s. 8*d.*: and drawn by 3 horses, mares, geldings, mules, or oxen, 1s. 1*d.*; and drawn by one horse, mare, gelding, mule, or ox, 6*d.*

For every horse, mare, gelding, mule, or ass, laden, or unladen, and not drawing, 1*d.*

For every drove of oxen, or neat cattle, 10*d.* per score, and so in proportion for any greater or less number.

It was also provided, that no more than one toll should be demanded or taken from any person or persons for passing or repassing the same day with the same horses, cattle, beasts and carriages, through all the toll-gates or turnpikes to be continued or erected by virtue of the act, in the whole length of that part of the said road which lies between *Dunchurch* and the city of *Coventry*: but that all and every person and persons having paid the said tolls should pass and repass with the same horses, cattle, beasts and carriages toll free during such day through all the other toll-gates or turnpikes within that division.

From the 15th *March*, 1819, to the 6th *November*, 1819, the *Balloon* stage-coach, drawn by 4 horses, in its way from *London* to *Birmingham*, passed through the *Ryton* gate, one of the gates erected and continued under the authority of the last mentioned act, and situate in the county of *Warwick*, between *Dunchurch* and *Coventry*, at 6 o'clock in the morning, daily, when a toll of 1s. 6*d.* was demanded from the plaintiff's coachman and received by the collector as agent for and on account of the defendant. The same coach repassed through the same gate, with the same coachman, but with different horses and passengers, in its way back to *London*, at 7 o'clock in the evening, daily, on which the said toll had been so paid as aforesaid, when a second toll of 1s. 6*d.* was demanded by the defendant's agent, and paid by the plaintiff's coachman, after protesting against the legality of the demand.

By the 10 *G.* 3., one of the acts passed for repairing the said line of road, it was provided, that no action or suit should be commenced against any person or persons for any

thing done in pursuance of that act, or the said former acts, until 21 days' notice should be given thereof to the clerk to the said trustees, or after sufficient satisfaction or tender thereof had been made to the party or parties aggrieved, or after six calendar months after the fact committed; and every such action or suit should be laid or brought in the county or place where the matter should arise, and not elsewhere; and the defendant or defendants in every such action or suit should and might, at his or their election, plead specially, or the general issue, not guilty, and give that act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of that act. And if the same should appear to be so done, or that such action or suit should be brought before 21 days' notice should be given thereof as aforesaid, or after a sufficient satisfaction made or tendered as aforesaid, or after the time limited for bringing the same as aforesaid, or should be brought in any other county, then the jury should find for the defendant or defendants.

By the 42 G. 3., it was enacted, that the before mentioned acts, and all and every the clauses, powers, penalties, forfeitures, provisions, matters, and things whatsoever, therein contained, except such as related to exemptions from stamp duties, should be, and the same were further continued for and during the term thereinafter mentioned, namely, 21 years from the 22d *June*, 1802.

Dover, for the plaintiff. There are three questions in this case. First, whether the action ought, necessarily, to have been brought in the county of *Warwick*; second, whether it was necessary to give the defendant 21 days' notice of action; and third, whether the toll taken upon the return of the coach, could be legally exacted. The first two questions resolve themselves in principle into one, and may both be answered in the negative. The act, rendering those formalities necessary, applies exclusively to actions of *tort*, whereas this is an action of assumpsit. The act provides

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that no action shall be commenced after satisfaction made or tendered to the party aggrieved, and that the defendant may plead *not guilty*, both which provisions plainly allude to actions of tort, and not to actions of assumpsit. [*Bayley*, J. Not guilty may be a good plea to a declaration in assumpsit.] None of the statutes requiring notice of action have been held to extend to actions of assumpsit In *Irving* v. *Wilson* (*a*), where an excise officer seized, as forfeited, goods which were not liable to forfeiture, and took money from the owner to release them, the Court held that assumpsit for money had and received would lie to recover back the money, although no notice of action had been given. [*Bayley*, J. The ground of that decision was that the money was not taken colore officii.] That distinction will apply here, for the second toll was not legally due, the exaction of it, therefore, was not an act done in pursuance of the act, or colore officii. In *Greenway* v. *Hurd* (*b*), which was also an action of assumpsit, it was, indeed, held that an excise officer who had received duties not legally payable, was, nevertheless, entitled to notice of action, but that was on the ground that he received the money bonâ fide, believing it to be legally due, and proved the honesty of his intention by paying it over to his superior officer. It was decided in *Umphelby* v. *M'Lean* (*c*), that in an action for money had and received brought against collectors for excessive charges on a distress for arrears of taxes, the defendants were not entitled to notice under the 43 *G*. 3. *c*. 99. *s*. 70.; and yet that statute provides that no writ or process shall be sued out for any thing done in pursuance of that act, until after a month's notice. [*Bayley*, J. There the cause of action was, not the taking the money, but the neglecting to refund the surplus, which could not be done colore officii.] Neither was the taking of the money here colore officii, nor an act done pursuant to the statute, because it was not legally due. A doubt was once expressed by Lord *Ellenborough*, with respect to the *London* Docks Act, whe-

(*a*) 4 T. R. 485. (*b*) 4 T. R. 553. (*c*) 1 B. & A. 42.

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then notice was necessary in an action of assumpsit: *Wallace* v. *Smith* (*a*): the point, however, was not decided, therefore the case cannot be relied on. Secondly, the defendant was not authorized to exact the second toll for the same carriage and horses during the same day. In *Williams* v. *Sangar* (*b*) the toll was upon every horse and every carriage that passed the gate; the exemption was in favour of every person who had paid once during the day, repassing with the same carriage *or* horses: and it was held that a second toll was not payable, during the same day, for the same carriage, though drawn by different horses, if the same in number. Le Blanc, J., in his judgment, observed, "the duty is not laid *on the horses drawing a carriage*, but *on the carriage drawn by so many horses*." So here, the toll is not upon horses, but upon carriages drawn by horses. In *Gray* v. *Shilling* (*c*), where the toll was precisely the same, it was held, that one toll having been paid on horses passing with a carriage, a second toll was not demandable on the same horses returning the same day with a different carriage. In *Loaring* v. *Stone* (*d*), where the exemption was for repassing with the same horses and carriages, it was held that a second toll was demandable for a different carriage, repassing the same day, drawn by different horses: but that was because the toll there was upon horses drawing carriages, whereas here it is upon carriages drawn by horses. It must be admitted that in this, as in the case last cited, the exemption is for repassing with the same horses, cattle, beasts *and* carriages, whereas in *Williams* v. *Sangar* (*e*) the word *or* was used; but considering the words in the order in which they stand, and construing them reddendo singula singulis, and so as to give the exempting-clause its full effect and operation, the word *and* here must be read *or*, because else the clause cannot extend, as it clearly was meant to do, to persons repassing with the same horses, cattle, or beasts, not laden.

(*a*) 5 East, 115. (*b*) 10 East, 66.
(*c*) 1 J. B. Moore, 371. 2 B. & B. 30. S. C.
(*d*) Ante, vol. iii. 197. (*e*) 10 East, 66.

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Reader, contrà. It is hardly requisite to cite authorities upon the first two points, for the words of the act decide them. The act expressly requires that this defendant should have notice and that the action should be brought in the county of *Warwick*. The action is founded upon an act done in pursuance of the statute, for the defendant demanded the toll in his character of collector, and the plaintiff's coachman paid it to him, under protest indeed, as collector. The doubt expressed by Lord *Ellenborough* in *Wallace* v. *Smith* (a) sprung entirely out of the decision in *Irving* v. *Wilson* (b), but the latter of those cases is very distinguishable from the present. There, the act done by the custom-house officer, namely, the receipt of money for the release of goods which he had seized, but which turned out not to be liable to seizure, was not an act done in pursuance of the statute, and therefore it was clear that the defendant was not entitled to notice under the 28 G. 3. c. 70. s. 30. It is admitted on the other side to have been held in *Greenway* v. *Hurd* (c), which was an action of assumpsit, that an excise officer was entitled to notice of an action brought against him to recover duties illegally received by him, because he was acting in his character of excise officer; and yet the very objection now relied on, namely, that the statute was confined to actions of tort, was raised in that case. *Umphelby* v. *M^cLean* (d) has no bearing upon this case; for there the act was not done in pursuance of the statute, and here it most clearly was. The same distinction applies also to the recent case of *Morgan* v. *Palmer* (e), where the Court held a magistrate not entitled to notice of action, because the fee paid him was received, not in his character of magistrate, but for his own private emolument. But, secondly, the defendant was justified in demanding and taking the toll in question. The toll is imposed upon carriages drawn by horses; the exemption is in favour of persons repassing during the same day with the same horses

(a) 5 East, 115. (b) 4 T. R. 485. (c) 4 T. R. 553.
(d) 1 B. & A. 42. (e) Ante, vol. iv. 283.

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and carriages: the plaintiff, therefore, is liable to the toll, and does not come within the exemption, because he was not a person repassing, with the same horses *and* carriage, as the case expressly states, for both the horses drawing the carriage, and the persons conveyed in and upon it, were different. The plaintiff can only succeed by substituting in the exempting clause the word *or* for the word *and*, and that cannot be done. *Williams* v. *Sangar* (*a*), therefore, is no authority for the plaintiff, for there the words of the exempting clause were, "the same horses *or* carriage," and they were doubtless the same in *Gray* v. *Shilling* (*b*), for the two cases are put in precisely the same point of view by *Dallas*, C. J. in his judgment in the latter. *Louring* v. *Stone* (*c*) is in substance the same case as the present, and upon the authority of that case it is clear that the defendant was entitled to demand and take this toll.

Dover, in reply, shortly contended that *Morgan* v. *Palmer* was a case in point, and was conclusive to shew that notice of action was not necessary in the present case.

BAYLEY, J.—This case presents two questions. First, whether the action is properly brought; and, second, whether the plaintiffs are liable to the payment of a second toll upon the same carriage repassing on the same day, through the same gate, with the same driver, but with different horses and different passengers. Our opinion is against the plaintiffs on the first point, and our judgment, consequently, will be that a nonsuit shall be entered; but as our opinion is in favour of the plaintiffs on the second point, and that opinion seems to us important for the interests of the public to be made known, we think it right to explain the grounds upon which it is formed. This act of parliament, like all others of the like nature, must, if possible, be construed with reference to the particular words adopted in it;

(*a*) 10 East, 66. (*b*) 1 J. B. Moore, 371. 2 B. & B. 30 S. C.
(*c*) Ante, vol. iii. 707.

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but if those words have an equivocal import, and the meaning of the act thereby becomes doubtful, then it must be construed according to the well known, just, and established rule of law, namely, most strongly in favour of the public upon whom it tends to impose a burthen. Now, the act imposes a toll, first, upon carriages drawn by horses, (not upon horses drawing carriages,) and afterwards upon horses not drawing, and upon cattle, separately: and exempts from a second toll all persons repassing the same day, with the same horses, cattle, beasts, *and* carriages. Then the question arises how the word "and" in the exempting clause is to be construed, for upon the construction of that single word this question entirely turns. The clause, undoubtedly, applies exclusively to the same persons repassing on the same day, that is the same persons who were liable to the payment of the toll on first passing. If the word "or" had been adopted in this clause, instead of the word "and," it is quite clear that this case would have been governed by *Williams* v. *Sangar* (a), and the plaintiffs would not be liable to the second toll. Some of the obscurity attached to this clause arises from the improper introduction of the words "cattle" and "beasts," between the words "horses" "and carriages." But previous clauses had imposed a duty, first, on carriages drawn by horses, mares, geldings, or mules; then, on horses, mares, geldings, or mules not drawing; then, on droves of oxen, or neat cattle. Then, reddendo singula singulis, the exemption must, I think, be taken to apply, separately and individually, to every thing which is previously made the subject of taxation, and the whole clause must be construed, not conjunctively, but distributively. Then the result will be this. If you repass the same day with the same carriage, you are to pay no toll; if you repass the same day with the same horses, not drawing, you are to pay no toll; if you repass the same day with the same drove of oxen, or neat cattle, you are to pay no toll. There is nothing in the exempting

(a) 10 East, 66.

clause to connect the word "carriages" with the word "horses," or to shew that it is meant to apply only to the same carriages repassing drawn by the same horses; and consequently, it seems to me that the same carriage, driven by the same person, that is, the person originally liable to pay toll, repassing the same day, is exempt from a second toll, whether drawn by the same or by different horses. Such a construction will be assimilating the decision in this case to that in *Williams* v. *Sangar* (a), which case differs from the present only in the single particular already pointed out; and such an assimilation is extremely desirable, for it is very much for the interest of the public that the same construction should be put upon acts of parliament so nearly the same, and that nice and subtle distinctions should not be suffered to prevail, where real and important differences in the liability of individuals must result from them, though such differences were never anticipated or intended. *Loaring* v. *Stone* (b) is quite distinct from the present case, for there the toll was not imposed upon carriages, but upon horses drawing carriages, and the word "and," in the exempting clause, clearly applied to the same horses drawing the same carriages. Upon the first question, which is one of very general importance also, I am of opinion, both upon the arguments used and the authorities cited, that the defendant was entitled by the protecting clause of the 10 *G.* 3. to twenty-one days' notice of action, and that the plaintiffs were bound to lay the venue in the county of *Warwick*, where their cause of action arose. Undoubtedly there are several expressions in that clause which seem peculiarly applicable to actions of tort, but in considering such a subject we are to look rather to the substance than to the form of the action. There are many cases in which, though the subject matter of the action is a tort, the plaintiff may waive the tort, and bring assumpsit, but still, he must comply with the substantial provisions of the statute which gives the right of action, for he must not, by adopting any particular form of action, oust the defendant of the

(a) 10 East. 66. (b) Ante. vol. iii. 797.

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privilege which the statute was intended to give him. The clause states, "that no action or suit shall be commenced against any person for any thing done in pursuance of this act, or the said former acts, until twenty-one days' notice thereof shall be given to the clerk to the trustees, or after sufficient satisfaction or tender thereof hath been made to the party aggrieved; or after six calendar months next after the act committed; and every such action or suit shall be laid or brought in the county or place where the matter shall arise and not elsewhere, and the defendant in every such action or suit shall and may at his election plead specially, or the general issue, not guilty; and give this act, and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act." Now, if this action is brought in consequence of a thing done substantially in pursuance of the act, it is a case within the act, and the question is, whether this clause, taken altogether, is confined to actions of tort, or is extended to actions of assumpsit. The two main objects of the clause are, that notice shall be given to the trustees in order that they may tender satisfaction, and that the action should be brought promptly; both which will be defeated if this is not a case within the act: and persons will be at liberty to bring actions for all sums of money collected under any misconstruction of the act, at any period within six years. It is said that the taking of the toll in this case, was not an act done in pursuance of the statute. I am of opinion that it was. That expression means only that the defendant must be acting bonâ fide and colore officii, believing himself to be right, and where he so acts, although erroneously and illegally, he is within the protection of the statute. I think the present defendant did every thing that he did, in pursuance of the statute First, he stopped the carriage at the gate, demanded the toll, and refused to let it pass through until that toll was paid. That was an obstruction for which an action on the case would clearly have been maintainable, and if he had followed that up by seizing

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one of the horses, as a security for the toll, he would as clearly have been liable to an action of trespass. Then what difference arises merely from the fact that the plaintiffs have waived the tort, and brought an action of assumpsit? In my opinion none. There are, however, some authorities upon this point which it is proper shortly to notice. *Fletcher* v. *Wilkins* (*a*) was an action of replevin, and a proceeding *in rem*, and on that ground was held not to be within the 24 *G.* 2. c. 44. s. 6., that, therefore, does not apply to the present case. *Irving* v. *Wilson* (*b*) is equally inapplicable, because there the defendant was not acting colore officii when he took the money. But *Greenway* v. *Hurd* (*c*) is directly in point. There it was held that the defendant was entitled to notice, because he was acting colore officii, and intended to keep within the strict line of his duty, although, in fact, he by mistake exceeded it. Lord Chief Baron *Thompson*, a very able lawyer, at the trial of that case, overruled the law laid down by *Grose*, J. in *Irving* v. *Wilson*, and this court afterwards confirmed his decision. In *Wallace* v. *Smith* (*d*) Lord *Ellenborough* certainly doubted whether such an act of parliament extended to actions of assumpsit; but his doubt arose out of the decision in *Irving* v. *Wilson*, and he by no means went the length of overruling that in *Greenway* v. *Hurd*. In *Umphelby* v. *M'Lean* (*e*) there was no act done by the defendant pursuant to the statute, or colore officii; he was guilty of a non-feazance in omitting to restore money which he never had any authority to take. So, in *Morgan* v. *Palmer* (*f*), where the point was recently and fully before the Court, notice was held unnecessary only on the ground that the defendant was not acting in execution of his office when he took the money. For these reasons, I am of opinion, that this action ought to have been brought in *Warwickshire*, where the cause of action arose, and that the twenty-one days' notice of it ought to have been given.

(*a*) 6 East, 283. (*b*) 4 T. R. 485. (*c*) Id. 553.
(*d*) 5 East, 115. (*e*) 1 B. & A. 42. (*f*) Ante, vol. iii. 283.

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It is our duty to give full effect to such a clause as this, if we can, and, for that purpose, to construe it, not according to the form of action, but to the substance of the act done; and upon that construction, I think this action is brought in respect of an act done substantially in pursuance of the statute, and consequently that the defendant is within the protection of the statute, and entitled to notice.

HOLROYD, J.—I concur in the view taken by my brother *Bayley* upon both the points in this case. I think the plaintiffs were exempt from the payment of the second toll, and if twenty-one days' notice of the action had been given, and the venue had been laid in the county of *Warwick*, I have no doubt that the plaintiffs would have been entitled to recover. The fair construction of the exempting clause seems to me to bring this case within its operation. If the word "or" had been used instead of "and," *Williams* v. *Sangar* (a) would have been directly in point, and the change of word makes no material difference, because the word "and" in this act of parliament must be construed disjunctively, or at least distributively, as if the word *respectively* had been appended to the sentence. *Louring* v. *Stone* (b) is distinguishable from the present case, and the decisions of the two will not be inconsistent; for as the toll there was imposed upon horses drawing carriages, and not, as here, upon carriages drawn by horses, the insertion of the word "carriages" in the clause of exemption would have been utterly useless, unless that clause was meant to be confined to the same horses drawing the same carriage. Upon the other point, *Greenway* v. *Hurd* (c) seems to me, in effect and in principle, to decide this case. I think the construction there put upon the words "any thing done in pursuance of this act," is the sound and legal construction, and that it applies to the present case. Upon that authority, and upon the exposition both of the cases and of the act of parliament, so fully gone into by my brother *Bayley*,

(a) 10 East, 66. (b) Ante, vol. iii. 797. (c) 4 T. R. 553.

and to which I do not think it necessary to add anything, I think the defendant was entitled to notice. Upon that ground, therefore, judgment of nonsuit must be entered.

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Judgment of nonsuit.

The KING v. The INHABITANTS of CHEDISTON.

Where a pauper's brother-in-law, without any authority from the former, and without his knowledge, hired a house at 18*l*. a year, and allowed the pauper to remain in possession for two years and a quarter, and then, without notice directed him to quit, which he did immediately, not having paid any rent or taxes during the time:— *Held*, that the pauper was a tenant at will and thereby acquired a settlement by renting a tenement within the meaning of the 13 and 14 *Car*. 2, c. 12.

BY an order of two justices *Thomas Squire*, his wife and eight children were removed from *Halesworth* to *Chediston*, both in the county of *Suffolk*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case:

The pauper, *Squire*, whose original settlement was admitted to be in *Chediston*, and who occupied a farm there in 1806 at an annual rent of 300*l*., assigned over his farm for the remainder of his term, together with his farming stock and crops, to his brother-in-law *Thomas Page*, upon trust, to cultivate the farm during the remainder of the term, and, at the expiration of the lease, to sell the stock and crops for the payment of the pauper's debts, and then, upon trust, to pay over the balance (if any) to the pauper. *Page* acted under the trusts of this deed until *Michaelmas*, 1817, when the lease expired, but no final settlement of accounts took place, and nothing was paid to the pauper, his property, as stated by *Page*, not being sufficient to pay his debts. At *Michaelmas*, 1817, *Page*, not having any authority from the pauper so to do, and without his knowledge, hired a house in *Halesworth*, of the value of 18*l*. a year, of one *Hunsby*, since deceased, in which *Squire* and his family resided. Some of the furniture belonged to *Squire*, and some to *Page*. The house was much larger than was required by *Squire*, and was taken by *Page* because he could not procure a smaller one. *Squire* never paid rent for the house, nor parish rates, nor taxes. They

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were all paid by *Page*, who was assessed in the parish rates, and in the tax collector's assessment for the house. The pauper and his family continued to reside in the house till *Christmas* 1819, when *Page*, without any notice, directed the pauper and his family to quit the house at *Halesworth*, which he did. *Page* stated that he considered *Squire* responsible to him for the rent, but when *Page* hired the house he did not think he should get the rent. It was also proved by a witness that in the course of a conversation which he had with *Hinsby*, the deceased owner of the house in question, *Hinsby* stated that he had let his house to *Squire*, and that upon the witness expressing doubts as to *Squire's* responsibility, *Hinsby* told him that the rent was guaranteed by *Page*. The reception of this witness's evidence was objected to by the counsel for the respondents, but admitted by the Court. The question for the opinion of the Court is, whether the pauper gained a settlement in *Halesworth* by occupying the house in that parish under the circumstances above mentioned.

Marryatt and *E. Alderson*, in support of the order of sessions. The pauper gained no settlement in the parish of *Halesworth*. It is an established rule of law, that in order to gain a settlement by renting a tenement, the party must have a legal possession, and a rightful occupation in the capacity of tenant. These circumstances are negatived by the facts of this case. The pauper never came to settle in character of tenant. The facts found are that the house was taken by *Page* without the pauper's authority or even knowledge; that the pauper never paid rent, taxes, or rates for the house; that *Page* was assessed for the parochial and assessed taxes, which he paid, and also the rent; that *Page* hired the house, and that though he allowed the pauper to go into it, yet the latter gave up the possession the moment he was told to do so. It is clear, therefore, that he never had any rightful possession, or control over the house, for otherwise he could not have so acted. A right to remain in

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possession is essential to the acquirement of his settlement; this he never had, and therefore the sessions did right in confirming the order of removal. The principle on which this case must be decided is to be collected from *Rex* v. *South Sydenham* (a), *Rex* v. *Whixley* (b), *Rex* v. *Culmstock* (c), *Rex* v. *Hooe* (d), *Rex* v. *South Lynn* (e), *Rex* v. *St. Michael's, Coventry* (f), and *Rex* v. *Netherseal* (g). There is nothing here to shew that the pauper had a right to remain in the tenement for a single day or hour. If his intention was to settle there at all, it is perfectly uncertain for what length of time he entertained such an idea. But it is clear he never went there for the purpose of settling, and had no right of his own so to do.—In short, he merely went there to find a place wherein he might lay his head. No case has gone the length of holding that under such circumstances a settlement could be gained. [*Bayley*, J. The argument on the other side probably will be, that as between *Page* and the pauper there was a tenancy at will.] Still it ought to have been found by the case, as a fact, that there was such a tenancy. None such is found, and therefore it cannot be presumed.

Dover (with whom was *Eagle*,) contrà. If the declaration of *Hunsby*, the landlord, (of which no notice is taken in the argument on the other side,) was admissible in evidence, there is an end of the case; for, according to that declaration, the house was in fact let to the pauper, although the landlord might have looked to *Page* as a guarantee. But independently of that question, there is enough on the face of the case to shew that the pauper gained a settlement in point of law, within the intent and meaning of the statute 13 & 14 *Car.* 2. c. 12. and the authority of decided cases. Assuming that *Page* was the person who originally hired the house, yet it is manifest that he never hired it for his

(a) 1 Stra. 57. 2 Bott. 462. (b) 1 T. R. 137. (c) 6 T. R. 730.
(d) 4 East, 362. (e) 5 T. R. 664. (f) 15 East, 567.
(g) 4 T. R. 258.

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own occupation, for as soon as it was hired he let the pauper into possession, and the latter occupied it for two years and a quarter. From this state of facts one of two conclusions must follow; either that *Page* was the pauper's agent in hiring the house, in which case a settlement, when coupled with a sufficient evidence, would be gained,—or that the pauper became a tenant at will to *Page*, in which case also he would gain a settlement. It is sufficient for the present purpose to say that he was tenant at will, and in that view *Rex* v. *Fillongley* (a), *Rex* v. *Fritwell* (b), and *Rex* v. *Lakenheath* (c) are express authorities to shew that he gained a settlement. Actual payment of rent is not necessary, so long as the tenement is of the value of 10*l.* Here the tenement is found to be worth 18*l.* per annum, and therefore a settlement was gained (d).

BAYLEY, J.—I think the order of sessions must be quashed, being of opinion that the pauper came to settle upon a tenement worth 10*l.* a-year, in the parish of *Halesworth*, within the intent and meaning of the 13 & 14 *Car.* 2. and thereby gained a settlement in that parish. The facts I take to be these: the pauper originally resided in *Chediston*, where his farm was, and upon the expiration of the lease, *Page*, who had the complete control over his property, takes a house of the value of 18*l.* in the parish of *Halesworth*, in which he places the pauper and his family, who reside there for upwards of two years. On this statement, it appears that he took it as a residence for the pauper and his family, and for them only. Undoubtedly *Page* put a part of his own furniture into the house, but still, as far as we are informed, the pauper had the exclusive occupation. It may be truly said, that if the pauper was not substantially the tenant to the original landlord, and if *Page* did not take the house in the character of agent, he

(a) 1 T. R. 458. (b) 7 T. R. 197. (c) Ante, vol. ii. 816.
(d) See *Rex* v. *Benniworth*, ante, vol. iv. 355, *Rex* v. *Cherry Willingham*, ante, vol. iii. 13.

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might have removed the pauper whenever he thought fit; but by suffering the pauper to go into possession did he not thereby make him his own tenant at will, and if he did, and allowed him to remain for a period of forty days, does not that give him a settlement? The case may be looked at in two ways. Either *Page* took the house as agent for *Squire*, or he took it upon his own account with a view to permit *Squire* to occupy. There may be considerable doubt whether the sessions would have been authorized in holding, that he took it as agent for *Squire*: because that would be making the latter liable to pay the whole rent of a house which was larger than he required, and which perhaps it would have been out of his power, especially as it was hired without his privity, to pay. The more reasonable conclusion to be drawn from the facts is, that *Page* hired it on his own account. But when he puts *Squire* into possession of the house, in what relation does the latter stand? It appears to me he stands in the relation of tenant at will. Then, according to the cases, if he resided more than forty days in that character, that is quite sufficient to confer a settlement. In *Rex* v. *Fillongley* (a), the pauper's brother said to him, "I am sorry for your family, and therefore I will give you a close in *A.* about four acres, to enjoy as long as I please, and to take it again when I please, and you shall pay nothing for it." This was strictly a tenancy at will, and yet it was held, that the land so enjoyed by the pauper was to be taken into consideration in estimating the value of the tenement which was to confer a settlement. In *Rex* v. *Lakenheath* the pauper occupied a house rent free, but worth 10*l.* a-year, which was assigned to him as his residence in the character of schoolmaster to a charitable foundation, and though by the terms of the will he was liable at any time to be dismissed from the office of schoolmaster, at the will and pleasure of the donor, yet his residence for more than forty days was held sufficient to confer a settlement within the meaning of the statute. Now if

(a) 1 T. R. 458.

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seems to me that this is a stronger case than *Rex* v. *Fillongley*; because I am satisfied that *Page* took this house in order that *Squire* might reside in it, and that *Squire* went to reside there strictly as his tenant at will. Then, if he was a tenant at will, and continued under that tenancy for a period of more than forty days, it appears to me to be sufficient to confer a settlement. In all these cases it is desirable to adhere to settled decisions, and not unnecessarily create nice distinctions.

Holroyd, J.—I am of opinion that a settlement was gained by the pauper in the parish of *Halesworth*. I think it appears sufficiently clear that the pauper occupied this house by the permission of *Page*, who is the person who is to be taken as having hired it. The case states, that the house was much too large for *Squire*, and that *Page* had taken it because he could not procure a smaller one. This shews clearly that it was for the purpose of the pauper's occupation that it was taken, and he is accordingly let into possession, and remains there for upwards of two years with the permission of *Page*, who pays the rent and taxes. I think, therefore, the pauper must be considered as a tenant at will. He would have such a possession as would entitle him to call it his dwelling, in case of burglary. He might also maintain an action for a trespass on the premises, on the same principle. I am, therefore, of opinion, he gained a settlement.

Littledale, J.—It is quite clear in this case that the pauper gained a settlement in *Halesworth*. There is no statement of the precise terms on which the pauper was let into possession, but I think he must be taken to have been a tenant at will, for *Page* turns him out at a moment's warning; and having resided for more than 40 days as tenant at will upon a tenement worth 18*l*. a year, I think he gained a settlement.

Order of sessions quashed.

MORETON *v.* HARDERN and two others.

Declaration in case, against three proprietors of a stage coach, stated that the coach was under the care of the defendants, and that through their negligence the coach ran against the plaintiff, and injured him. The evidence was that one of the defendants was driving when the accident happened. The jury found that the accident was occasioned by *his negligent* driving:—Held, that the plaintiff might maintain case against all the proprietors. *Semble*, that he might have maintained trespass against the one who was driving.

DECLARATION in case. The first count stated that plaintiff, on &c. was passing along the public highway at &c. and the defendants were then and there possessed of a certain coach and divers, to wit, four horses, drawing the same, under the care and management *of a certain then servant of defendants*, who was then and there driving the same: yet defendants, by their said servant, so carelessly, negligently and improvidently managed and drove the said coach and horses, that the wheels of the coach ran with great violence against the plaintiff, by means whereof his leg was broken, &c. Second count similar, only stating the coach and horses to be under the care and management *of defendants*. Plea, not guilty, and issue thereon. At the trial before *Warren*, C. J. of *Chester*, at the *Chester* Summer Assizes, 1824, the facts of the case were these:—The defendants were the proprietors of a stage coach running between *Manchester* and *Congleton*. When the accident happened, the plaintiff was driving a cart along the high road, and the coach was being driven along the same road by the defendant *Hardern*, the coachman employed by the proprietors to drive it being seated by his side. The accident was occasioned by the coach running against the plaintiff. There was no proof that the defendant *Hardern* saw the plaintiff at the time. Two objections were taken on the part of the defendants: first, that as the coach was driven by one of the defendants, and not by their servant, there was a variance between the allegation in the first count and the evidence in that respect; and second, that the injury having been occasioned directly by the act of one of the defendants, was immediate, and therefore the second count was bad also, for the action should have been trespass, and not case. The learned judge overruled the objections, but reserved the points, and the whole case being left to the jury, they found for the

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plaintiff, damages 200*l.*, stating that the accident was occasioned by the negligence of the defendant *Hardern*. Upon this finding the plaintiff was nonsuited, with leave to move to enter a verdict in his favour for 200*l.*; and a rule nisi having been obtained accordingly in *Michaelmas* term,

Temple, (with whom was *Gurney*,) now shewed cause. Neither of these counts can be supported. The first is disproved by the evidence; for it alleges that the coach was under the care of a servant of the defendants, whereas it was proved to be driven by one of the defendants themselves. The second was proved, but it alleges an injury arising immediately from the act of the defendants, the form of action, therefore, should have been trespass, and not case. *Leame* v. *Bray* (*a*) and *Lotan* v. *Cross* (*b*) are authorities directly in point, and are decisive of this case.

J. Williams, (with whom was *D. F. Jones*,) contrà. It will not be necessary for the Court to review the cases of *Leame* v. *Bray* and *Lotan* v. *Cross*, nor to give any opinion respecting the doctrine laid down in those and other cases of the same class, in which it has been held that a direct and immediate injury is properly the subject of an action of trespass. That doctrine by no means militates against the plaintiff in the present case. Both these counts are supported by the evidence, as well in reason as in law. With respect to the first, the coachman employed by all the defendants was sitting on the coach-box, close to the defendant *Hardern*, who was driving, and as he might at any moment have resumed the reins, he must be considered, both in law and in fact, as the person having the care and management of the coach. But, waiving the benefit of that argument, this is an action of tort, in which the plaintiff may recover against any one of the defendants singly, as well as against all jointly. Now, as the defendant *Hardern* was not the proper coachman, it was negligence in the other defendants

(*a*) 3 East, 593. (*b*) 2 Camp. 464.

to suffer him to drive; and looking at the case in that point of view, the second count is supported, because that charges that the injury was caused by the negligence of the defendants, and the jury found that the injury was caused by the negligence of the defendant *Hardern*. The fact, found by the jury, that the negligence of the defendant *Hardern* was the cause of the injury, will of itself support both counts; for he may be considered as the servant of the other defendants with reference to the allegation in the first, and as one of the proprietors with reference to the allegation in the second. It is, therefore, perfectly plain that case was the proper form of action against all the defendants, for there is no allegation of wilful misconduct, and no imputation of malice, on the part of any one of them, to support trespass.

BAYLEY, J.—I am of opinion that an action upon the case is maintainable under the present circumstances, and, consequently, that the rule for setting aside the nonsuit, and entering a verdict for the plaintiff, must be made absolute. The second count of this declaration alleges, that the defendants were possessed of a certain coach and horses, which were under their care and management, and that they so carelessly and improperly managed and directed the said coach and horses, that through their negligence, carelessness and improper conduct, the coach run against the plaintiff, and occasioned the injury complained of. The objection raised against this count is, that the form of action should have been trespass, and not case, for, that as one of the defendants was driving, the injury was immediate and not consequential, and case would not lie. The answer to that objection, in the first place, is, that the plaintiff had a right of action against all the defendants as joint proprietors, and that trespass undoubtedly would not lie against them all. Trespass, perhaps, might have been maintained against the one defendant who was driving, but it certainly could not against the other two, who were absent from the spot. It was for a long period of time vexata quæstio, whether case

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would lie where the defendant was personally present, and acting in that which produced the injury. It has been the course for many years, throughout nearly the whole of my professional experience, to adopt case as the form of action under such circumstances. In Lord *Kenyon's* time a doubt arose upon the point, and he, undoubtedly, was of opinion, that where the injury resulted immediately from the defendant, case would not lie, and the form of action must be trespass. *Leame* v. *Bray* was an action of trespass, and Lord *Ellenborough* at the trial being of opinion that it should have been case, nonsuited the plaintiff. Upon further consideration, however, though the Court thought that under the circumstances trespass was maintainable, they did not say that case would not have been maintainable also, if the injury had been charged as occasioned by negligence. Looking at the other decisions bearing on the point, I am unable to come to the conclusion that an action on the case will not lie for an injury sustained through the negligent driving of a coach, although one of the owners of the coach is the party guilty of such negligence. In *Ogle* v. *Barnes and others* (a), the declaration, which was in case, for negligently steering a vessel, alleged that the vessel was under the care of one of the defendants, and of certain servants of the defendants, and that the injury was sustained through their negligence. Case was held to be the proper form of action, and the argument that it ought to have been trespass was urged, not upon the ground of one of the defendants being present and acting, but upon the ground of the injury being immediate, and that only. In *Rogers* v. *Imbleton* (b) the declaration, in case, alleged that the defendant was driving a horse and cart, which, through the negligence and inattention of the defendant, ran against the plaintiff. On demurrer to the declaration, for not being in trespass, it was held good, and *Mansfield*, C. J. observed, that in his opinion the decision of this Court, in *Leame* v. *Bray*, deserved reconsideration. In *Huggett* v. *Montgomery* (c) it appeared

(a) 8 T. R. 188. (b) 2 N. R. 117. (c) Id. 446.

that though the defendant, who was the owner of the vessel, was on board, yet that the vessel was not under his immediate care, but under the management of a pilot, when the accident happened, and upon that ground it was held, that case, and not trespass, was the proper form of action. In the present case it is not necessary to go the length of saying that trespass might not have been maintained against the defendant *Hardern*. No doubt, where the injury is occasioned by the wilful act of the defendant, trespass is maintainable, but it does not therefore follow that case will not lie, and where the act is not wilful, but merely negligent, I take it to be quite clear that it will. Here, the jury have found the injury to have been occasioned by the negligent driving of the defendant *Hardern*, but upon the ground that the plaintiff had a right of action against all the defendants, and could not have maintained trespass against them all, I am of opinion that case was the proper form of action for him to adopt.

HOLROYD, J.—I am clearly of opinion that this nonsuit ought to be set aside. Where there is no cause of action except a trespass, the trespass, perhaps, cannot be waived, and case maintained; but where there is an actual injury sustained, the trespass may be waived, and case maintained upon the special circumstances. For that position *Pitts* v. *Gainer* (*a*) is an authority. So, in trover, although the conversion may be the actual taking of the goods, the trespass may be waived; and in many other cases, any act which is a mere aggravation of the trespass, may be made the ground of an action on the case. Here the plaintiff had a cause of action, independent of the trespass, if indeed trespass was maintainable at all; as to which I desire to be understood as giving no opinion at present. The general rule, though none need be laid down here, I take to be, that where there is no wilful act done, but the injury is occasioned by mere negligence, case, and not trespass, is the proper form of action. The real cause of action here was the negligent

(*a*) 1 Salk. 10.

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driving of the defendant *Hardern*. The plaintiff has sued all the proprietors, and he was right in so doing, for they are all responsible for the conduct of the person whom they suffer to drive, whether he is one of themselves, or their servant. Trespass might lie against the one defendant who drove, as the person who committed the particular act complained of, but it would not lie against the other proprietors, because the act of trespass committed by one, would not make the others joint trespassers. Against the other proprietors, therefore, case was the only form of action maintainable, and if it would lie against them, it will lie against him also as a joint proprietor with them, because a cause of action still remains after the trespass has been waived. I am, therefore, of opinion that the plaintiff is entitled to a verdict and judgment against all the defendants.

Littledale, J.—I am of opinion that an action on the case is maintainable against all the defendants, and I think it unnecessary to decide whether trespass might or might not be maintained against the one defendant who was driving when the accident occurred. It is quite clear that trespass would not lie against the other two defendants, and that case would; and I think the finding of the jury as clearly shews that case will lie also against the third, because it appears from thence that the injury was caused by his negligent driving. Here the declaration alleges the injury to have been occasioned by negligence. The declaration in *Ogle* v. *Barnes* did the same, and there, upon a motion in arrest of judgment, the Court said they would *intend* the injury to have been caused by negligence. If case was the proper form of action there, it must be so here. The question is there put by *Lawrence*, J. on a very reasonable ground, namely, that it is properly a question of evidence whether the act done was negligent, or wilful. I think that is a sound criterion, and that it applies to this case: the plaintiff, therefore, is entitled to have the verdict entered in his favour.

Rule absolute.

PHILPOT *v.* PAGE.

After an unsuccessful motion in arrest of judgment, a party is not at liberty to move for a new trial, even within the first four days of term, for by moving to arrest the judgment, he affirms the verdict.

THIS was an action for a libel. At the trial bef *Graham*, B. at the last *Summer* Assizes for the county of *Kent*, the jury found for the plaintiff, damages one farthing. On the second day of *Michaelmas* term a motion was made to arrest the judgment, but refused, and on the following day the Court granted a rule nisi for a new trial. On shewing cause against that rule,

F. Kelly now contended, that after a motion in arrest of judgment it was irregular to move for a new trial. For this he cited *Tuberville* v. *Stamp* (*a*), and *Philips* v. *Crabb* (*b*). It is laid down as a general rule of practice in *Tidd* (*c*), *Impey* and *Archbold* (*d*), that a party shall not move for a new trial, after motion in arrest of judgment. Here therefore, the motion for a new trial ought not to have been made.

Platt, contrà. It is competent for either party to move for a new trial, at any time within the first four days of term, notwithstanding a motion in arrest of judgment may have taken precedence. The ground of the objection in *Tuberville* v. *Stamp* seems to have been, that the motion for a new trial was made after the first four days of term had expired, for in 1 *Salk.* 23. it appears that the motion in arrest of judgment had been argued and over-ruled. There is no case to be found in which it appears to have been held that a motion for a new trial may not be made after a motion in arrest of judgment, provided the party moves within the first four days of term. Upon general principles, and according to the reason and justice of the thing, there can

(*a*) 2 Salk. 647. (*b*) Comber. 459. (*c*) 8th Ed. 944.
(*d*) 1st Ed. vol. ii. 200. See Carth. 425. 1 Burr. 334. Pr. Reg. 241. and 1 Chit. Cr. Law, 658.

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be no objection to the present course of proceeding. Upon the return of the venire a four day rule for judgment nisi causa is given, and if either party comes within that time and assigns sufficient cause why judgment should not be signed, there is no sensible reason why he should not be at liberty to do so.

BAYLEY, J.—I am of opinion that the application for a new trial came too late. It is of great importance to keep the steps in a cause distinct. According to the regular practice of the Court, when a motion is made in arrest of judgment, it is always understood that there is no objection to the verdict, but that there is something arising upon the face of the record, sufficient in law to deprive the successful party of the benefit of the verdict. The motion in arrest of judgment, indeed, implies that there is a subsisting valid verdict. It would therefore be wasting the time of the Court, if after making an unsuccessful motion in arrest of judgment, in the first instance, the party were at liberty to go back again to a motion for the purpose of vacating the verdict, the validity of which he must be taken to have admitted by moving to stay the judgment. As far as my experience has gone, it has been the constant and invariable practice to move first, for a new trial, if there is any objection to the verdict, and then to arrest the judgment; or to move for a new trial, with liberty to move to arrest the judgment at a future period; but I know of no instance in which a party was allowed to move first in arrest of judgment, and then to move for a new trial. I think that by moving in the first instance to arrest the judgment, the party affirms that there is no ground on which he can impeach the verdict, and therefore he is not at liberty afterwards to disaffirm it, upon finding that the experiment of moving to arrest the judgment has failed.

HOLROYD, J.—I also think that the application made in the first instance to arrest the judgment, implies that the

party has no objection to make to the verdict, and that he has no ground for moving for a new trial. He thereby affirms the verdict, but only insists that the Court cannot give judgment as the record stands. It is laid down in all the books of practice, (and certainly as far as my experience goes, it confirms the position,) that the party must first move for a new trial if he has any ground for disturbing the verdict, or he may move at the same time for liberty to arrest the judgment. That I take to be the invariable course of proceeding; and *Tuberville* v. *Stamp* and *Rex* v. *White* (a) are authorities in point. I therefore see no reason for departing from the practice in the present instance.

LITTLEDALE, J. was absent.

Rule discharged.

(a) 1 Burr. 334.

FRAGANO *v.* LONG.

Plaintiff, residing at *Naples*, ordered goods of *M* at *Birmingham*, "to be dispatched on insurance being effected. Terms three months' credit from the time of arrival." *M.* effected an insurance, declaring the interest to be in plaintiff, and having marked the goods with plaintiff's initials, sent them to *Liverpool*, where they were delivered by *M.*'s agent to the owner of a vessel loading for *Naples*, by whose negligence they were damaged:—Held, that the property in the goods vested in plaintiff as soon as they left *Birmingham*, that he was liable to pay for them whether they arrived or not, and, therefore, that he was entitled to sue the ship-owner for the damage done to them by his negligence.

ASSUMPSIT against defendant, as the owner of a ship, for negligently shipping plaintiff's goods. Plea, non assumpsit, and issue thereon. At the trial before *Hullock*, B., at the *Lancaster* Summer assizes, 1824, the case was this. In *March*, 1822, the plaintiff, resident at *Naples*, sent to Messrs. *Mason*, hardwaremen at *Birmingham*, an order for certain goods therein specified, of which the following is a translation. "*Naples*, 28th *March*, 1822. Order transmitted by *G. Fragano*, of this city, to *Mason* and sons of *Birmingham*, through Mr. *F. L.*, for the following merchandise, to be dispatched on insurance being effected.

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Terms to be three months' credit from the time of arrival." Messrs. *Mason* received this order in *April*, 1822, and in pursuance thereof they sent the goods in question, marked with the plaintiff's initials, by the canal, from *Birmingham*, to Messrs. *Stokes*, their shipping agents at *Liverpool*, with instructions to forward them to *Naples*. The goods were insured, and the policy expressed the interest to be in the plaintiff. On the 3d *July*, Messrs. *Stokes* received from the canal carrier notice of the arrival of the goods, and they sent their porter, who received the goods, and carried them in a cart to the wharf, at which the defendant's vessel lay, and delivered them upon the wharf to the mate of the vessel, who gave him the following receipt. "Received in good order and condition on board the *James and Theresa*, for *Naples*, one cask of hardware. *G. F.* from *W.* and *J. Stokes*. *Samuel Smith*, mate." While the cask remained in the custody of the mate, and before it was actually shipped, it fell into the water, and the goods sustained the damage complained of. The jury, under the learned judge's direction, found a verdict for the plaintiff.

In *Michaelmas* term last, a rule nisi for a new trial was granted, upon two grounds: first, that as no bill of lading was made out, the property in the goods never vested in the plaintiff; and second, that by the terms of the order, the goods were not to be at the plaintiff's risk until their arrival at *Naples*.

F. Pollock was now called upon to support the rule. The plaintiff should have been nonsuited for two reasons. First, there was no bill of lading made out to him, consequently the property in the goods never vested in him. The mate's receipt being given to Messrs. *Stokes* left the goods in their power, and their subsequent order for the re-delivery of the goods, would have been binding upon him. *Craven* v. *Ryder* (a) [*Bayley*, J. That was a case of stoppage in transitu.] Yes; but it was held that the property

(a) 6 Taunt. 433; 2 Marsh. 127. S. C.

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in the goods remained in the plaintiffs; the case, therefore, applies in principle. Secondly, the goods neither were, nor were they intended to be, at the plaintiff's risk, until they arrived at *Naples*, for they were to be paid for three months after arrival, and if they never arrived the plaintiff could not have been called on for payment at all. On both these grounds, it is clear, that the plaintiff never had any such interest in the goods, as entitled him to maintain this action.

Crompton, contrà, was desired to confine himself to the second point. The goods were originally furnished upon the account and credit of the plaintiff, and the mode of payment agreed upon could not alter the period when the property vested in him. That was a mere matter of arrangement between the parties, and could not prevent the vesting of the goods. *Rugg* v. *Minet* (a). The act of marking the goods with the plaintiff's initials, designated them as his property, and his ordering an insurance upon them, shews that he considered them as being at his risk, from the moment they left the hands of the vendors.

BAYLEY, J.—The only possible doubt in this case springs out of the peculiar terms of the order, for independently of that, the right of action is clearly in the plaintiff, both by law and justice. The order directs the goods "to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival." Except for that order the goods never would have left Messrs. *Mason's* warehouse, and when in pursuance of that order, they did leave it, they were marked with the plaintiff's initials. What could that mean, if not to designate them as *his* goods? If the goods had been destroyed by lightning on their way to *Liverpool*, who must have borne the loss the plaintiff, or Messrs. *Mason?* The plaintiff most undoubtedly. On their safe arrival at *Liverpool*, Messrs. *Stokes*,

(a) 11 East, 210.

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who were Messrs. *Muson's* shipping agents, shipped the goods and took a receipt from the mate. It is said that the property then vested in Messrs. *Stokes*, the agents, and that they, and they only, could have maintained an action for them. I think that argument is not correct, although some difficulty might have arisen, if they had set up an adverse interest. But the plaintiff was their principal, and as the goods were sent from *Birmingham* by his order, and at his risk, I think he was the person entitled to sue for them, unless the particular form of the order deprives him of that right. It is argued that the form of the order throws the risk upon the vendors until the arrival of the goods at *Naples*, because, as they were not to be paid for until three months after arrival, that arrival was a condition precedent to the vendor's right to demand the price. But if the goods were not to be paid for unless they arrived, why were they insured? The insurance is conclusive to shew that the arrival was not a condition precedent to the payment. If the goods arrived, they were to be paid for within three months from that time; and if they never arrived, they must still have been paid for within a reasonable time after their arrival became impossible. If this were not so, the policy would become altogether useless, for then the plaintiff could not sue upon it, and clearly no one else could, because the interest was declared to be in him. I am, therefore, of opinion that the form of the order does not vary the rights of the plaintiff, and that the verdict which has been found for him ought not to be disturbed.

HOLROYD, J.—I am of the same opinion. The receipt given by the mate to *Stokes* did not vest the property in the goods in the latter. He was a mere agent, and it is an established principle of law that the act of the agent is done for the benefit of his principal, and that the principal has a right to sue in respect of a loss, though the defendant has dealt only with the agent, and does not even know of the

existence of the principal. With respect to the order, construing it in its fair sense, and according to legal principles, I think the goods became the property of the plaintiff from the moment they were dispatched from *Birmingham*. The arrival of the goods was not a condition precedent to the payment, for the insurance shews that they were to be throughout their transitus at the risk of the plaintiff.

LITTLEDALE, J.—If there were formerly any doubts upon the subject, it is now settled law, that where goods are to be delivered at a distance from the vendor, they vest in the vendee the moment they quit the possession of the vendor. But for the order, therefore, these goods were the property of the plaintiff, as soon as they left *Birmingham*. Then, *Stokes* was a mere agent, and a receipt to him was no less a receipt to the plaintiff as the real owner, and *Stokes* could not honestly have made out a bill of lading to any other person than the plaintiff. If the order had specified that the payment was to be three months after arrival, and nothing more, perhaps arrival might have been considered a condition precedent to payment; but it has this important addition, that the goods are to be dispatched on insurance being effected. Why should the plaintiff insure the goods, if they were not his property, and at his risk? Yet the policy was effected at his expense, and for his benefit, and no other person could possibly have sued upon it. The effect of the order was really no more than this, that if the goods arrived, they were to be paid for in three months afterwards, and if they did not arrive, the law would imply from it a promise to pay for them within a reasonable time.

Rule discharged.

1825.

WHARTON *v.* WALKER.

L., being indebted to plaintiff, gave him an order upon defendant (*L.*'s tenant) to pay him out of the rent that should next become due. Plaintiff sent the order to defendant, but they had no personal communication on the subject. When the next rent became due, defendant shewed the order to *L.*, and undertook to pay plaintiff's demand, upon which *L.* accepted the balance, and gave defendant a receipt for the full rent:—Held, that this arrangement gave plaintiff no right of action against defendant.

ASSUMPSIT for money had and received, and upon an account stated. Plea, non assumpsit, and issue thereon. At the trial before the Recorder of *Chester*, at the last Summer assizes for that city, the case was this. One *Lythgoe*, being indebted to the plaintiff in the sum of 4*l.* 5*s.*, gave the plaintiff an order upon the defendant, his tenant, to pay him that sum out of the rent that should next become due. The plaintiff sent the order to the defendant, but they never had any personal communication upon the subject. Upon the next rent becoming due, and being demanded of the defendant by *Lythgoe*, the defendant shewed him the order, and undertook to pay the plaintiff his demand, upon which *Lythgoe* accepted the balance from the defendant, and gave him a receipt for the full amount of the rent. The defendant did not pay the plaintiff, and the present action was brought. Upon this evidence it was objected that the action could not be maintained, it being founded entirely upon a parol promise to pay the debt of a third person, which was void by the statute of frauds; and the learned judge, being of opinion that the objection was good, nonsuited the plaintiff, with leave to move to enter a verdict for 4*l.* 5*s.*

Cottingham, in *Michaelmas* term last, obtained a rule nisi accordingly, against which

J. Williams now shewed cause. It is impossible that the count for money had and received can be supported under the circumstances of this case, because the defendant never received any money, either in point of fact, or by legal construction, to the use either of the plaintiff, or of any other person. The transaction was merely the assignment of a debt or a chose in action, and as such was void. The

other count is equally insupportable, because as there never was any actual dealing, or any direct communication, between the plaintiff and the defendant, it was impossible that there should be any account stated, or in existence between them. *Israel* v. *Douglas* (a), therefore, is mainly distinguishable from this case, for there a direct communication did take place between the parties, and the debt owing to *Delvalle* was discharged, which formed a good consideration for the defendant's promise. It is farther to be observed that *Wilson*, J. differed from the rest of the Court in that case, and that the propriety of the decision has since been matter of doubt. *Taylor* v. *Higgins* (b).

Cottingham, contrà. This action was maintainable without proof of any direct communication between the plaintiff and the defendant. There was clear evidence of a promise by the defendant to pay the debt of the plaintiff, and to whom that promise was originally made was immaterial, because the arrangement was afterwards assented to by all the parties. *Lythgoe* gave the order; the plaintiff accepted it, and sent it to the defendant; and the defendant, when he settled with *Lythgoe* for his rent, deducted the amount of the order, promised to pay it to the plaintiff, and received a receipt for the whole. The amount of the order, thus left in his hands, became by legal construction, money had and received by him to the use of the plaintiff; *Wilson* v. *Coupland* (c): but even if it did not, still it is clearly recoverable as upon an account stated between them. *Cuxon* v. *Chadley* (d) does not interfere with this argument, because in that case there was only an accord, and no satisfaction; but here there is both accord *and* satisfaction.

BAYLEY, J.—*Wilson* v. *Coupland* is no authority for the present case; that stood on very different grounds. The defendants there were in the first instance indebted to

(a) 1 H. Bl. 239. (b) 3 East, 169.
(c) 5 B. & A. 228. (d) Ante, vol. v. 417.

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Taillasson and Co. for money had and received, and *Taillasson* and Co. were indebted to the plaintiffs. Things being so, it was arranged by the consent of all the parties, that the plaintiffs should accept the defendants as their debtors instead of *Taillasson* and Co. By that arrangement *Taillasson* and Co.'s debt was extinguished, and as the defendants had been originally indebted to them for money had and received, it was held that the plaintiffs might recover against the defendants in the same form of action. But here the defendant never received any money to the use of any person whatever. The very same objection occurred in *Israel* v. *Douglas*, and has been the foundation of those doubts which have since been entertained respecting the propriety of that decision: but no such objection occurred in *Wilson* v. *Coupland*. There is, however, another objection in the present case. The arrangement here was not made by the consent of all the parties; they did not all concur in it; consequently that arrangement gave the plaintiff no right of action against the present defendant. The intermediate debt was never extinguished here; nothing was done that could have the effect of extinguishing it; for the plaintiff never accepted the defendant as his debtor instead of *Lythgoe*; his right of action against *Lythgoe* still remained. This brings the present case directly within that of *Cuxon* v. *Chadley*. There are two objections, therefore, to the count for money had and received; first, that the defendant never received any money to the use of the defendant; and second, that *Lythgoe's* debt to the plaintiff was never extinguished; and the latter of those objections applies with equal force to the count upon an account stated. The nonsuit, therefore, was right, and the rule for setting it aside must be discharged.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule discharged.

1825.

MANIFOLD *v.* PENNINGTON and others.

Declaration, setting out a right of common for *all* commonable cattle. Proof, that plaintiff turned out all the commonable cattle he had, but that he had no sheep.—Held, not a fatal variance.

DECLARATION, in case, for disturbing plaintiff's right of common, stated, that plaintiff was possessed of a messuage and two hundred acres of land, with the appurtenances, situate in the parish of *Budworth*, in the county of *Chester*, and by reason thereof was entitled to common of pasture for *all his commonable cattle*, levant and couchant; and that defendants disturbed him, &c. Plea, not guilty, and issue thereon. At the trial before *Warren*, C. J. at the last summer assizes for the county of *Chester*, it was proved that the plaintiff was a freeholder within the township of *Leigh*, in the parish of *Budworth*, and that he had been long accustomed to turn out upon the common in question, all such commonable cattle as he from time to time possessed; but it also appeared that he had never, at any time, kept any sheep, and that all those freeholders who did keep sheep, turned them out on the common. Upon this evidence it was objected that there was a fatal variance between the description of the plaintiff's right in the declaration and the nature of it as proved, and the learned Judge, being of that opinion, directed a nonsuit, but gave the plaintiff leave to move to set it aside.

Parke, in *Michaelmas* term last, moved accordingly, and obtained a rule nisi; he cited *Ballard* v. *Dyson* (*a*) and *Ricketts* v. *Salwey* (*b*).

D. F. Jones and *Cottingham* now shewed cause. The nonsuit was right. This case is perfectly distinguishable from those upon the authority of which the rule was granted. [*Bayley*, J. Ought not the case to have gone to the jury? Surely the fact that the plaintiff turned out all the commonable cattle he possessed was primâ facie evidence of his

(*a*) 1 Taunt. 279. (*b*) 2 B. & A. 360.

1825.
MANIFOLD v. PENNINGTON.

right to turn out all commonable cattle.] Perhaps so; but the plaintiff made no such point at the trial; he insisted that he had fully proved his right as laid in the declaration: now that he certainly had not done, and upon that ground he was properly nonsuited.

Parke, contrà, was stopped by the Court.

BAYLEY, J.—If it had been proved that the plaintiff possessed cattle which he did not turn out upon the common, the case would have stood upon different grounds. But the evidence, such as it was, certainly ought to have been left to the jury, for they were the proper persons to judge of its effect and value. Upon that short ground it seems to me that the plaintiff is entitled to a new trial, and, if so, it is unnecessary to consider how far this case is, or is not, governed by those to which Mr. *Parke* referred us.

The other judges concurred.

Rule absolute.

DOE, on the several demises of R. W. FOX, W. BURT, and W. PRIDEAUX, v. W. BROMLEY.

Where the memorial of an annuity deed described one of the subscribing witnesses as "*G. M. Dance*, of *Cursitor Street*, in the county of *Middlesex*, attorney at law," without setting out his Christian names at full length, in compliance with the 53 *G.* 3, c. 141, s. 2:—Held, a fatal objection in ejectment for the premises on which the annuity was secured.

In ejectment there is but one plaintiff; and therefore where several lessors of the plaintiff, who were separately interested, joined in the same ejectment:—Held, that they could not be separately heard.

EJECTMENT for certain premises situate in the parish of *St. Stephen*, in the city of *London*. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Easter* term, a verdict was taken for the plaintiff, for one shilling damages, subject to the opinion of this Court upon a special case, the whole of which it is unnecessary to set out, inasmuch as the decision of the Court was founded

upon a misdescription in the memorial of the annuity deed upon which the lessors of the plaintiff founded their title.

The defendant had granted an annuity of 180*l.* in *March* 1817, to *H. Prideaux*, for two lives, chargeable on the premises in question, payable as mentioned in the annuity deed, which contained covenants on the part of the defendant to keep the premises in repair and insure them from fire, during the continuance of the annuity. The deed further contained a power of entry and distress, on a quarter of a year's annuity being in arrear. One of the subscribing witnesses to the annuity deed was *George Michael Dance*, and in the memorial of the deed he was described as "*G. M. Dance*, of *Cursitor Street*, in the county of *Middlesex*, attorney at law." At the trial, one of the objections taken on the part of the defendant against the plaintiff's right to recover was, that in the said memorial containing the names and descriptions of the witnesses, the initials of the Christian names of *Dance* only are mentioned, and not the Christian names at length.

Abraham, for the plaintiff, being desired by the Court to confine his attention to this objection, contended that it was not an answer to the action. He admitted that the case of *Cheek* v. *Jefferies* (*a*) was an authority to show that the Christian names of the subscribing witnesses must be set out at full length in the memorial; but he contended that the later case of *Const* v. *Phillips* (*b*), which arose on the statute 17 *Geo.* 3. c. 26. was an authority in his favour. In the latter statute the word "name" was used in the singular number, and in the 53 *Geo.* 3. c. 141. the word "names" was used, but he submitted that that could make no difference, if there was sufficient certainty in the description of the subscribing witnesses. Now here nothing could be more explicit than the description given of the subscribing witness, Mr. *Dance*. He is described as "*G. M. Dance*, of *Cursitor Street*, in the county of *Middlesex*, attorney at

(*a*) Ante, vol. iii. 135, S. C. 2 B. & C. 1. (*b*) Ante, vol. iv. 344.

1825.

Doe v. Bromley.

law." If notoriety be the object of the legislature in requiring a full description of the subscribing witnesses, here that object has been complied with; for Mr. *Dance*, being an attorney of the Court, he could at all times be found.

Carter, for one of the lessors of the plaintiff, who was separately interested, claimed to be heard for his client, but

Bayley, J. said—In ejectment there is only one plaintiff to whom the Court can look. If parties separately interested, chuse to join in the same ejectment, their interest must be treated as one and the same, and as if there were but one plaintiff.

Marryat, for the defendant, was stopped by the Court.

Bayley, J.—I am of opinion that the objection made to the memorial of this annuity is unanswerable, and I should, perhaps, have thought there was no distinction in this respect between the statutes 17 *Geo.* 3. c. 26. and 53 *Geo.* 3. c. 141., because it appears to me that the difference between *name* and *names* is only a literal, and not a substantial distinction. If we look to the provisions of the 17 *Geo.* 3. we find that the legislature, in express terms, requires that the *name* shall be written at full length in the deed, in order that the parties may not be excused from putting the name at full length into the memorial. Suppose there are two persons of the same surname, subscribing witnesses to the deed, one of whom is called by his Christian name *John*, and the other *Jacob*, it cannot be said that it would be sufficient to give in the memorial merely the initials of their Christian names. There may be five or ten persons in existence to whom the same initial may apply. Those, therefore, who are interested in knowing the true names of the subscribing witnesses are left completely in doubt as to what person is meant by the initial. The 17 *Geo.* 3. requires the *name* to be introduced, but the 53 *Geo.* 3. requires that

you shall introduce the *names* of all the parties and of all the witnesses to the instruments. I have looked attentively to both statutes, and I confess it does not appear to me that there is any very substantial difference between the word *name* in the first, and *names* in the second. It might be, with reference to what was the intention of the legislature in the first statute, that the word *names* is introduced into the latter, in order that such intention might be more clear and explicit. The column in the 53 *Geo.* 3. shews what was the understanding of the legislature in using the word *names*, and is decisive to shew that an initial description of any of the Christian names would not be sufficient. This case must, in my opinion, be governed by *Cheek* v. *Jefferies*, in which the point was expressly decided. Here the true name of the subscribing witness is *George Michael Dance*, whereas the memorial gives only the initials of the Christian names. But it is suggested that there can be no difficulty in finding out who *G. M. Dance* is, inasmuch as he is described as *an attorney at law*. It does not, however, necessarily follow that because you find "*G. M. Dance*, attorney at law," in the column of witnesses in the memorial, that he is the same person who is mentioned and referred to in the deed; and unless you can be sure that he is the same person, the objection arises, for non constat, but he may be a different person. The decision cited from 4 *Dowling* and *Ryland* is distinguishable from the present case. In that the memorial, as it existed *at the time the motion was brought before the Court*, contained, *in fact*, the initials only of the Christian names of the subscribing witness; but the Court, in deciding that case, does not at all retract the decision pronounced in *Cheek* v. *Jefferies*. The ground of the decision was, that inasmuch as there appeared to be erasures in the memorial, showing that the memorial had been improperly dealt with, and there being an affidavit produced in which the deponent stated his belief that the Christian names of the subscribing witness had been obliterated, and the initials only left, and consequently that there

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had been a fraud on the part of those interested in setting aside the annuity, the Court said, they would not interfere after the lapse of eighteen years, more especially as the parties had been in Chancery, where advantage might have been taken of the objection if it then existed. The case, therefore, of *Coust* v. *Phillips* being distinguishable from this, I think we are bound to act upon the decision in *Check* v. *Jefferies*. The result is that the postea must be delivered to the defendant.

HOLROYD, J.—I am quite satisfied that the case of *Cheek* v. *Jefferies* was correctly decided. The case of *Coust* v. *Phillips* went on quite a different ground.

LITTLEDALE, J. concurred.

Postea to the defendant

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Where, in an action for slandering the plaintiffs in their business of bankers, it was proved that *W.* said to defendant, "I hear that you say that the plaintiffs' bank at *M.* has stopped; is it true?" and the defendant answered, "Yes, it is. I was told so. It was so reported at *C.*, and nobody would take their bills, and I came to town in consequence of it myself:"—*Held*, that as in actions of slander there are two sorts of malice, one in law, and the other in fact, it ought to have been left to the jury to say, first, whether the defendant understood *W.* as asking for information, and whether he had uttered the words merely by way of honest advice to regulate *W.*'s conduct; and if they were of that opinion, secondly, whether, in so doing, he was guilty of any malice in fact.

CASE for slanderous words, alleged to have been spoken of and concerning the plaintiffs in their trade and business of bankers, at *Monmouth* and *Brecon*. The first count charged the words spoken to have been, "The bank of *Bromage* and *Snead*, at *Monmouth*, is stopped." The second count charged, that in a discourse with one *L. Watkins*, in the hearing of other persons, and in answer to a question by the said *L. Watkins* as to the plaintiffs in their trade and business, and as to the defendant having said that the bank of the plaintiffs at *Monmouth* was stopped, the defendant said, "Yes, it is. I was told so." The third count

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similar, only changing the words to be "Yes, it is." Plea, not guilty, and issue thereon. At the trial before *Park*, J. at the last summer assizes for *Monmouthshire*, the evidence of the speaking of the words was this:—On the 13th *January*, 1824, *Watkins*, meeting the defendant in *Brecon*, said to him, "I hear that you say the bank of *Bromage* and *Snead*, at *Monmouth*, has stopped. Is it true?" The defendant replied "Yes, it is. I was told so. It was so reported at *Crickhowell*, and nobody would take their bills, and I came to town in consequence of it myself." *Watkins* then said, "You had better take care what you say; you first brought the news to town, and told Mr. *John Thomas* of it;" to which the defendant again replied, "I was told so." On the part of the defendant it was proved that one *G. Brown*, to whom he had shortly before paid two one-pound notes of the plaintiffs' bank, had told him on the 12th *January* that there was a run upon *Bromage* and *Snead's* bank, and that if there was any thing in it, he, the defendant, must take the notes back; and that the defendant did afterwards take the notes back from *Brown*. The learned judge told the jury that there was no evidence of the defendant being actuated by any ill will against the plaintiffs, and that as malice was the gist of the action, unless they were satisfied that the words were spoken maliciously, the action was not maintainable, and they ought to find for the defendant. The jury found for the defendant.

Campbell, in last *Michaelmas* term, obtained a rule nisi for a new trial, on the ground that the question of malice had been improperly left to the jury, inasmuch as a malicious motive was to be inferred from the act of the defendant, the words which he had spoken not being justified by the occasion.

W. E. Taunton and *Maule* now shewed cause. Malice, or no malice, is properly a question for the jury, and was rightly so left by the learned judge in this case. In *Haver*

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v. *Dawson* (a), where the action was brought against a man for warning his friend respecting the circumstances of the plaintiff, *Pratt*, C. J. directed the jury, that though the words were otherwise actionable, yet if they should be of opinion that they were not spoken out of malice, but in confidence and friendship, and by way of warning, they should find the defendant not guilty, which they did. In *Rogers* v. *Clifton* (b) Lord *Alvanley*, in the course of his judgment, alluding to this very point, said, "I think I should have grievously invaded the province of a jury if I had not left it to them to say, whether, considering all the circumstances of the case, the conduct of the defendant was not malicious." These are authorities to shew that the circumstances leading to and attending the speaking of the words, are peculiarly for the consideration of the jury in deciding the question of malice. [*Bayley*, J. There are cases where the occasion justifies words which would otherwise be actionable; but they are excepted cases.] Still those cases establish the rule that facts and circumstances are evidence to negative malice, and ought to be left to the jury as such. *Edmonson* v. *Stevenson* (c) is another authority to the same point. [*Bayley*, J. That was the case of a confidential, and therefore privileged communication, and that distinction was there pointed out by Lord *Mansfield*, for he said, "*this* is not to be considered as an action in the common way for defamation by words; but that the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved." No doubt that is the rule in such cases, but is there any case which decides that malice is a question for the jury, where the words are not spoken as a confidential communication?] The present may almost be considered as the case of a privileged communication, for the words were spoken in answer to a question; they were not volunteered; but whether it be so or not, is a question for the jury. Independently, however, of this point, the defendant is entitled

(a) Bull. N. P. 8. (b) 3 B. & P. 587. (c) Bull. N. P. 8.

to retain the verdict. Upon the first count it is quite clear that the verdict is right. That contains a positive averment that the defendant said, "the bank of *Bromage* and *Snead*, at *Monmouth*, is stopped." The evidence was, that in answer to a question whether he had said so, and whether it was true, the defendant said, "Yes, it is; I was told so; it was so reported at *Crickhowell*;" which words fall very far short of a positive assertion that the bank had stopped. That count, therefore, could not possibly be supported, for there was a fatal variance between the averment and the proof. The second and third counts, which in their form are perfectly new and somewhat anomalous, are equally bad in substance as the first. The question, to which the words spoken by the defendant form an answer, is not set out; there is no averment that that answer had any reference to the assertion of the bank having stopped; and it is quite equivocal whether the defendant meant to reply, that he had made such an assertion, or that the assertion itself was true. The record, therefore, is bad, and as, for that reason, the plaintiffs, if they had obtained a verdict, could not have had judgment upon it, the Court, upon that ground, will refuse to grant them a new trial: *Garford* v. *Clerk* (*a*).

Campbell and *G. R. Cross*, contrà. The words spoken by defendant are in themselves clearly actionable. The plaintiffs, therefore, are entitled to a new trial, unless the Court are prepared to hold, that in every possible case of slander, without reference either to the occasion or the circumstances of it, malice is purely a question of fact for the jury. The rule has hitherto been considered to be, that where the words are in themselves actionable, the law will presume from their natural tendency, namely, to injure the plaintiff, that they are spoken maliciously, unless the defendant adduces conclusive evidence to rebut such a presumption. None of the cases cited on the other side apply to the present, because they are all cases of confidential and

(*a*) Cro. Eliz. 857.

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priv communications. This is not so. The evidence adduced here on the part of the defendant is not sufficient to rebut the legal presumption of malice, nor, even if it were, could it be properly receivable under the general issue. Suppose the defendant had been charged with saying that the plaintiffs had stolen a horse; it would have been no defence to the action to say that he was told so, and believed it to be true; nor, under such circumstances, could any question of malice be left to the jury. Such facts would be insufficient, though specially pleaded, and evidence of them would not be receivable under the general issue. Now, in this respect, there is no difference between words imputing felony, and those imputing insolvency. In the present case even if the slander had been communicated to the defendant under circumstances which justified him in repeating it, he would be equally inexcusable, because he did not repeat the words faithfully and precisely, and he did not at the time give up the author: *Davis* v. *Lewis* (a). Then, with respect to the evidence, it was clearly sufficient to support the first count. [*Littledale*, J. It seems to me that the first count is bad for not setting out the whole of the conversation. In an action for words, you cannot make up an affirmative proposition out of a previous question and answer, at least without shewing what that question and answer are.] Still the first count was supported by the evidence, because it was proved that the defendant admitted that he had, on a former occasion, spoken the words imputed to him, and that is evidence to support the averment that he did, in point of fact, speak those words. Then, with respect to the other counts, the objection now taken to them was not taken at the trial, and therefore comes too late. With reference to those counts, the words were proved as laid, even admitting them to be equivocal, and construing them quâcunque viâ. [*Bayley*, J. What is the meaning of the question "Is it true?" and of the reply, "It is."? Do they refer to the fact of the defendant having

(a) 7 T. R. 17.

asserted that the bank had stopped, or to the fact that the bank had stopped?] It is, perhaps, not easy to decide: the import was equivocal; and it was for the jury to define it. But whichever meaning those words bear, one or other of the counts was proved. If the defendant, by answering, "yes, it is," meant that he had used the words, the second count was proved; and if he meant that the bank had stopped, the third count was proved; and in either case, the plaintiffs were entitled to a verdict.

The case was argued on a former day, when the Court took time to consider. Judgment was now delivered by

BAYLEY, J.—This was an action of slander. The plaintiffs were bankers at *Monmouth*. The charge was, that in answer to a question put by a person named *Watkins* to the defendant, whether he, the defendant, had said that the plaintiff's bank had stopped payment, his answer was, "it was true; he had been told so." The evidence was, that *Watkins* met the defendant and said to him, "I hear that you say the bank of *Bromage* and *Snead*, at *Monmouth*, has stopped; is it true?" The defendant said, "yes, it is; I was told so." He added, "It was so reported at *Crickhowell*, and nobody would take their bills, and that he had come to town in consequence of it himself." *Watkins* said, "you had better take care what you say; you first brought the news to town, and told Mr. *John Thomas* of it." The defendant repeated, "I was told so." The defendant had been told at *Crickhowell*, that there was a run upon the plaintiffs' bank, but he was not told that it had stopped, nor was he told that nobody would take their bills. So that what he said went greatly beyond what he had heard. The learned judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but inasmuch as the defendant did not appear to have been actuated by any ill will against the plaintiffs, he told the jury that if they thought the words were not spoken

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maliciously, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought he spoke them maliciously, they should find for the plaintiffs. The jury, under this direction, found for the defendant; the main question upon a motion for a new trial was as to the propriety of this direction. If in an ordinary case of slander (not a case of privileged communication) want of malice is a question of fact for the consideration of the jury, then the direction was right; but if in such a case the law implies such malice as is necessary to maintain the action, then it is the duty of the judge to withdraw the question of malice from the consideration of the jury, and in that way of putting the case it appears to us that the direction was wrong. That "malice," in some sense, is the gist of the action, and that therefore "the manner and occasion of speaking the words" is admissible in evidence to shew they were not spoken "with malice," is said to have been agreed (either by all the judges, or at least by the four who thought the truth might be given in evidence on the general issue) in *Smith* v. *Richardson* (a); and in 1 *Com. Dig. tit.* Action upon the case for defamation, G. 5. it is also laid down, that the declaration must shew a "malicious intent" in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action; but in what sense the word "malice" or "malicious intent" are to be here understood, whether in the popular sense or in the sense which the law generally puts on those expressions, none of these authorities state. Malice, in common acceptation, means, ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a man a blow which is likely to produce death, though he is a perfect stranger to me, the law implies that I do it with malice because I do it intentionally, and without just cause or excuse. If I maim cattle or poison a fishery without knowing the owner, I do it of malice, (not of malice against the

(a) Willes, 24.

owner, which is necessary to bring the case within the policy of certain acts of parliament), because it is a wrongful act and done intentionally. And if I am arraigned of felony, and wilfully stand mute, I am said to do it maliciously, because it is done intentionally and without just cause. The cases upon this subject are well collected in Mr. *Russell's* book on Crimes (*a*). So if I traduce a man, whether I know him or not, or whether I intend to injure him or not, I take it that the law considers it done of malice because it is wrongful and intentional. It equally works an injury whether I meant to produce the injury or not, and if I had no real cause for the slander, why is he not to have his remedy against me when he has sustained the injury? The law recognizes a distinction between ordinary slander, and the excepted cases of privileged communication. In the case of ordinary slander it is sufficient to charge in the declaration that the defendant spoke the words falsely, and it is not necessary to state that they were spoken maliciously. This is laid down in *Styles*, 392, and was adjudged upon error in *Merker* v. *Sparks* (*b*). The objection there was, that the words were not charged to have been spoken maliciously, but the Court said that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. In the case, however, of privileged communications, or such slander as is primâ facie excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, malice *in fact* must be proved by the plaintiff; but then that case is considered as being distinguishable from the ordinary case of malice in law. The first case of that description in modern times was *Edmondson* v. *Stephenson* (*c*) where Lord Mansfield says "this is not to be considered as an action in the common way for defamation by words; but that the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved." He therefore

(*a*) Russell on Crimes and Misdemeanors, 614.

(*b*) Owen, 51. Moore, 459. Noy, 25.

(*c*) Bull. N. P. 8.

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distinguishes it from the ordinary case, and holds that in the case then under consideration, malice must, in fact, be proved; whereas in the ordinary case of slanderous words, proof of malice is not necessary. That case was founded on *Vanspike* v. *Cleyson* (*a*), which was an action for these words, "Doth *Vanspike* owe you any money?" The person to whom the question was addressed said "Yes." The defendant then said, "You had best call for it. Take heed how you trust him." This case came before the Court on demurrer, and the Court adjudged for the defendant. Why? because it was not any slander to the plaintiff, but good advice to the party who asked for it. There are many other cases to the same effect. In *Weatherstone* v. *Hawkins* (*b*), where a master, who had given a servant a character which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded him; *Wood*, who was counsel for the plaintiff, argued that this case did not differ from the case of common libels; that it had the two essential ingredients, namely, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied. It is sufficient to prove publication; the motives of the party publishing are never gone into, and that the same doctrine held in actions for words, no express malice need be proved. Lord *Mansfield* then takes the distinction already pointed out. He says, "The general rules are laid down as Mr. *Wood* has stated, but to every libel there may be an implied justification from the occasion. So as to the words, instead of the plaintiff's shewing it to be false and malicious, it appears to be incidental to the application by the intended master for the character;" and *Buller*, J. said "this is an exception to the general rules on account of the occasion of writing. In actions of this kind the plaintiff must prove the words malicious as well as false." In *Pasley* v. *Freeman* (*c*)

(*a*) Cro. Eliz. 541. (*b*) 1 T. R. 110. (*c*) 3 T. R. 61.

Buller, J. repeats that for words spoken confidentially upon advice asked, no action lies unless express malice can be proved. So in *Hargrave* v. *Le Breton* (*a*) Lord *Mansfield* states that no action can be maintained against a master for the character he gives a servant unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for the defendant on the ground of want of malice. Numberless occasions must have occurred, (particularly in cases where a defendant only repeated what he had heard before, but without naming the author,) upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question, whether the defendant understood *Watkins* as asking for information for his own guidance, and that the defendant spoke what he did to *Watkins*, merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper, as a second question to the jury, if their minds were in favour of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury. It was pressed upon us with considerable force, that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration, but on carefully attending to the declaration and the evidence, we think we are not warranted in saying that there was no evidence to go to the jury to support the declaration; and had the learned judge intimated an opinion that there

(*a*) 3 Burr. 2425.

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was no such evidence, the plaintiff might have attempted to supply the defect. We therefore think for the reason stated that we cannot properly refuse a new trial.

Rule absolute for a new trial.

GREEN, Executrix of DANIEL BOAZ, deceased, v. DAVIS.

Assumpsit by an executrix upon an instrument in this form: "Received of B. (the testator) 100*l.*, which, I promise to pay on demand, with lawful interest;" and the money counts. The instrument was made in 1814, upon a threepenny stamp, and was afterwards stamped with a 1*l.* agreement stamp. The proper stamp for a promissory note in 1814 was a three shilling stamp. The defendant had on one occasion promised to pay the plaintiff the arrears of interest:—Held, first, that this instrument was a promissory note; second, that the threepenny stamp was insufficient, and the 1*l.* stamp was illegally added, therefore the note was not receivable in evidence for any purpose; and third, that though the defendant's promise was an admission of a debt, yet as it did not appear what was the nature of the debt, nor in what character it was due to the plaintiff, nor that it was one for which assumpsit would lie, the plaintiff was not entitled to a verdict even for nominal damages.

ASSUMPSIT on a promissory note. Pleas, first, the general issue, and second, the statute of limitations. Issue thereon. At the trial before *Park*, J. at the *Staffordshire* Summer Assizes, 1824, the instrument produced in support of the action was this:—"*December* 2, 1824. Received of Mr. *Boaz*, 100*l.* which I promise to pay, with lawful interest. *J. Davis.*" This instrument bore a threepenny receipt stamp, and a one pound agreement stamp, and indorsed upon it was a receipt for 5*l.* penalty, and 1*l.* duty. The defendant's signature to this instrument was proved, and that about two months previous to the trial the plaintiff having applied to the defendant to send her a little interest of her money, the latter replied, "I was thinking about the old lady, and that she would be wanting some, and on *Sunday* I will bring her some interest of her money:" but, it appeared that no interest had ever been paid. For the defendant it was objected that this instrument could not be received in evidence, as a promissory note, for want of the three shilling stamp required for a promissory note of such an amount by the 48 *G.* 3. c. 149. the Stamp Act which was in force at the period when this instrument bore date. The learned Judge reserved the point, and the plaintiff obtained a verdict for 100*l.* and interest, the defendant having leave to move to enter a nonsuit.

W. E. Taunton, in *Michaelmas* term last, moved accordingly, and obtained a rule nisi, against which

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W. O. Russell and *Whately* now shewed cause. This instrument is not a promissory note, for it has no payee. It is a mere written acknowledgment of a debt, and as such is receivable in evidence without any stamp: *Israel* v. *Israel*(a), and *Fisher* v. *Leslie*(b). It may be regarded as something distinct both from a promissory note and a receipt, like the I. O. U. in *Childers* v. *Boulnois* (c), or as a mere accountable receipt, like the instrument in *Rowcroft* v. *Lomas*(d); and in either view it is receivable. But if it be a promissory note, it bore a sufficient stamp at the time when it was offered in evidence, and upon that ground also it was admissible. It was then legally and sufficiently stamped as an agreement, and was receivable in evidence as such. It will be contended on the other side that this instrument does not in legal effect amount to an agreement, and *Firbank* v. *Bell* (e), *Butts* v. *Swann* (f), and *Rowcroft* v. *Lomas*(d), will be cited in support of that proposition: but when the 55 *G.* 3. c. 184. s. 10. is examined, that argument will be found to have no weight. That section enacts, "that all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in law; except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof." Now the words, *shall have been used*, shew that the operation of that section was intended to be retrospective as well as prospective, therefore the only question when an instrument is produced in evidence, is whether the stamp which it *then* bears is, or is not, of equal

(a) 1 Camp. 499. (b) 1 Esp. N. P. C. 426. (c) D. and R. N. P. C. 8.
(d) 4 M. and S. 457. (e) 1 B. and A. 36. (f) 2 B and B. 78.

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or greater value with or than that required by the Act of Parliament. [*Bayley*, J. When this instrument was made, it certainly had an insufficient stamp, for it then had a threepenny note stamp only; then, being issued with an illegal stamp, had the commissioners authority to affix another stamp upon it afterwards?] It is not in evidence that they did so, for there was no proof as to when the agreement stamp was affixed; and the Court will not inquire *when* an instrument was stamped, if it bears a sufficient stamp when it is tendered in evidence: *Wright* v. *Ryley*(a).

W. E. Taunton, contra. This instrument is a promissory note; it was made in the year 1814, when the Stamp Act 48 *G.* 3. c. 149. was in force: and required, as appears by the schedule of that act, part 1. a three shilling stamp, for want of which it was inadmissible in evidence. No particular form, or set of words, is necessary to constitute a promissory note, and there are cases in which instruments worded quite as loosely and informally as the present, have been held to be good as promissory notes, and bills of exchange: *Morris* v. *Lee*(b), *Chadwick* v. *Allen*(c). Then, being a promissory note, and having been originally issued with an insufficient stamp, the commissioners had no authority afterwards to restamp it, and could not render it valid by so doing. A brief review of the different stamp acts will clearly prove the truth of this proposition. By the 37 *G.* 3. c. 136. s. 6. they are authorized to stamp bills or notes after they are made, where they have been made upon stamps of a proper value, but of a wrong denomination. By the 48 *G.* 3. c. 149. s. 8. the powers and provisions of former acts relating to the duties were to be put in execution with relation to the duties imposed by that act; and by s. 11. any person issuing a note not duly stamped was subjected to a penalty of 50*l*. That was the act

(a) Peake, N. P. C. 173.
(b) 1 Str. 629.
(c) 2 Str. 706. and See Chitty on Bills, 53. note 2. and the cases there collected.

in force when this note was made, and the indorsement on it proves that it was made upon a stamp of inferior value to that required by law, and consequently, that the commissioners had no power afterwards to restamp it. Then the case of *Bints* v. *Swann* (a) applies; for there an order for the payment of money, (which the stamp acts place on the same footing with a bill or note,) which had no stamp when it was made, but was afterwards stamped with a 1*l.* agreement stamp, was in that state tendered in evidence and rejected.

The case was argued on a former day in these Sittings, when the Court took time to consider of it. Judgment was now delivered by

Bayley, J.—This was an action upon a note, and the question was whether it was properly stamped. The note was in this form:—"*December* 2, 1814. Received of Mr. *Boaz*, 100*l.* which I promise to pay, with lawful interest. *J. Davis*;" and it bore a threepenny receipt stamp, and a 1*l.* agreement stamp. Four several points were made on the part of the plaintiff:—first, that as no payee was named in it, this was not a note, and required no stamp at all—second, that the stamps upon it were sufficient—third, that it was receivable as evidence of an account stated—and fourth, that the defendant's promise to bring the plaintiff some interest, was an admission that something was due, and at all events entitled the plaintiff to a verdict. The first point is clear beyond all doubt. No particular form of words is necessary to constitute a note, and *Chadwick* v. *Allen* (b) is express to shew, that the payee needs not be named more explicitly than he is here. The substance of the note there was this:—"15*l.* 5*s.* balance due to Sir *Andrew Chadwick*, I am still indebted, and do promise to pay." Whom the maker promised to pay was not in terms stated, but as he named no other payee, whom could he have in-

(a) 2 B. and B. 78.

(b) 2 Str. 706.

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tended but Sir *Andrew Chadwick*? So here *Boaz* is the person from whom the money is stated to have been received, and *Boaz* therefore is the only person to whom it could be intended to repay it. Then, upon the second point. The note bears date *December*, 1814; it must therefore be considered with relation to the stamp acts then in force and such subsequent acts as bear upon it. The stamp act then in force was the 48 *G.* 3. c. 149. according to which this note should have had a three shilling stamp. By s. 11. the person issuing such a note, not first duly stamped, was liable to a penalty of 50*l.* and by s. 8. the powers and provisions of former acts, as to former duties, were to be put in execution as to the duties imposed by that act. One of those former provisions was that of the 31 *G.* 3. c. 25. s. 19. namely, that the commissioners should stamp the paper before the thing charged, that is the note, &c. should be written thereon; that no note, &c. should be given in evidence, or admitted to be good, useful, or available, in law, or equity, unless the paper on which it was written was marked with a stamp denoting the duty or some higher rate or duty in that act contained; and that it should not be lawful for the commissioners to stamp any paper with any stamp directed by that act, after such note, &c. was written thereon. That provision was altered by the 37 *G.* 3. c. 136. s. 5. so far as to empower the commissioners to stamp notes, &c. after they were written; provided they were written upon stamps of the right value but of wrong denomination, and not otherwise; and, subject only to that alteration, it was still in force when this note was made. This note, therefore, was originally written upon a wrong stamp, and as the law then stood no other stamp could legally be put upon it, and the 1*l.* stamp which it now bears would have been unavailing. *Farr* v. *Price* (*a*), *Taylor* v. *Hague* (*b*), *Chamberlain* v. *Porter* (*c*), and 43 *G.* 3. c. 127. s. 6. The only subsequent alteration is that introduced by the 55 *G.* 3. c. 184. s. 10. that all instruments on

(*a*) 1 East, 55. (*b*) 2 East, 414. (*c*) 1 N. R. 30.

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which stamps have been used of an improper denomination but of sufficient value, shall be deemed valid and effectual, unless such stamps were specially appropriated to other instruments, by having their names on the face thereof. It has been contended that the operation of this section was retrospective as well as prospective, and consequently that this instrument having, when produced in evidence a 1*l.* stamp, which had no name upon the face of it, was within its protection. Whether or no that section be retrospective it is not necessary on the present occasion to decide; because we are of opinion that the time when the stamp was affixed is a legitimate and necessary matter of inquiry; and that as this note appeared at the trial, by the indorsement made upon it, to have received the 1*l.* stamp subsequent to the time when it was issued, it must be considered as a note issued with an insufficient stamp; and that the additional stamp having been affixed contrary to the prohibition of the 31 *G.* 3. c. 25. s. 19. does not remedy that insufficiency. Upon this point *Butts* v. *Swann* (*a*) is a decisive authority. The instrument there was an order for the payment of money, which, for this purpose, the stamp acts regard in the same light as bills or notes. It had, when written, no stamp at all, but it had, when tendered in evidence, a 1*l.* agreement stamp. It is not in terms stated, but may be clearly inferred from that case, that the stamp was not specially appropriated to agreements, because if it had been there could have been no room for argument on that point. The Court of *C. P.* decided that the instrument, having had no stamp when it was written, was not rendered valid by the subsequent addition of a stamp, *Dallas*, C. J. stating, that it was admitted that if the instrument constituted a bill of exchange, it could not be stamped after it was first issued, and *Richardson*, J. referring to the 31 *G.* 3. c. 25. as decisive of that proposition. *Wright* v. *Ryley* (*b*), which was before Lord *Kenyon* in this Court, was a totally different case. There, although the bill was stamped irregularly in point of

(*a*) 2 B. and B. 78. (*b*) Peake's N. P. C. 173

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time, it was stamped with the regular bill stamp; there was nothing upon the face of it to shew *when* it was stamped; and it was a negotiable bill, in the hands of an indorsee, who was not shewn to have taken it before it was stamped. That case, therefore, is no authority for the present plaintiff, and we feel ourselves compelled, reluctantly indeed, to hold, that the stamps in this case were insufficient, and consequently that the note was not receivable as evidence of an account stated, according to the 31 *G.* 3. c. 25. That the defendant's promise to pay interest was an admission of some existing debt from him to the plaintiff, there can be no doubt; but what was the nature of that debt; in what character the plaintiff was entitled to it; and whether it was one for which assumpsit would lie; we are left completely in the dark. Under these circumstances it is impossible for us to see that the plaintiff is entitled to a verdict even for nominal damages, and, therefore, we must decide, though not without regret, that the rule for entering a nonsuit must be made absolute.

Rule absolute.

KNOWLES and others, Assignees of W. GILPIN, a Bankrupt, *v.* Sir ALEXANDER MAITLAND, Baronet.

Where a regimental agent had received monies from the paymaster-general of the forces, under the authority of a warrant of attorney from the colonel, and the agent became bankrupt:—Held, in an action by the assignees for goods sold and delivered by the bankrupt to the colonel for the use of the regiment, that the colonel might set off the money which the agent had received from the paymaster-general remaining unaccounted for, in bar of the demand.

ASSUMPSIT for goods sold and delivered by the bankrupt to the defendant. Plea, the general issue. At the trial before *Abbott*, C.J. at the *London* adjourned sittings after last *Hilary* term, a verdict was found for the plaintiffs, for 1,650*l.* damages, subject to the opinion of the Court upon the following case:—

A commission of bankrupt, bearing date the 1st *April*, 1819, was duly issued against *Gilpin*, under which he

was duly adjudged to be a bankrupt, and the plaintiffs were duly chosen his assignees. The defendant, before and at the time of the bankruptcy, was the colonel of his late Majesty's 49th regiment of infantry. The bankrupt, before and until his bankruptcy, was agent of the said 49th regiment of infantry, having been appointed to be such agent by the defendant, as such colonel, under the usual power of attorney, bearing date the 22d *March*, 1804. *Gilpin*, before his bankruptcy, sold and delivered to the defendant, goods to and for the use of the defendant, to the amount of 1,650*l.*, consisting of clothing for the said 49th regiment. Whilst *Gilpin* was such agent, and before his bankruptcy, he, in his capacity of such agent, received from the paymaster-general of his Majesty's forces divers sums of money, exceeding the said sum of 1,650*l.*, and has never accounted for the same. The defendant has not yet paid the said sum of 1,650*l.*, and the same is still due and owing, to his present Majesty. The following is the form of the usual power of attorney by which the agent of a regiment is appointed by the colonel, and of the power of attorney from the colonel, under which the agents of regiments receive money from the paymaster-general of his Majesty's forces, and of the power of attorney under which *Gilpin* was appointed agent of the 49th regiment by the defendant: —"Know all men by these presents, that I, the Honourable *A. Maitland*, general in the army, and colonel of his Majesty's 49th regiment of foot, have made, ordained, constituted and appointed, and do hereby make, &c. *W. Gilpin*, of &c. my true and lawful agent or attorney, for me, in my name, to ask, demand, and receive, of and from the right honourable the paymaster or paymasters-general of his Majesty's forces, or of and from the paymaster or paymasters-general of the said forces for the time being, or of and from whomsoever else the payment thereof doth or may concern, all such pay and allowances as now are or may hereafter become due and payable unto me, the commissioned officers, non-commissioned officers, and private men of the aforesaid regiment, or unto the officers and men of

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any other regiment, troop, or company, to the command of which I may be appointed, or any other pay that is or may be due to me, either as a military or civil officer, and pay, donation, or allowance I may be entitled to from his Majesty's treasury, exchequer, ordnance, or other public department, and also any prize-money that I may be entitled to, of whatsoever description. And, upon receipt thereof, to give and execute such acquittances and discharges as may be necessary, granting by these presents unto the said *H. Gilpin* full power and authority in the premises, as fully and effectually to all intents and purposes as I myself could or might have had if these presents had not been made, hereby ratifying and confirming all and whatsoever my said agent or attorney may lawfully do or cause to be done by virtue thereof. In witness, &c. *A. Maitland*," &c.

On the 10th *July*, 1760, a general order, of which the following is a copy, was issued by his late Majesty *Geo. III.*, and which order is still in force.

War Office, 10 *July*, 1760.

SIR,

The King, being desirous to prevent the inconveniences which may arise upon the death of agents to regiments, was pleased to direct the board of general officers to take the matter into consideration and to report their opinion in what manner the said inconveniences may best be guarded against, and the board have accordingly reported to his Majesty that they have not been able to discover any better method of obviating the inconveniences, the foresight of which occasioned this reference, than by the colonels taking a sufficient security by a deposit of money, or by the agent vesting a sum in the public funds in the names of trustees applicable upon the demand of the colonel to make good any deficiency arising from the failure or death of the agent. The board being further directed to consider what sums of money an agent should deposit or vest in the public funds as a security for the several corps in his Majesty's service, report that they have not been able to fix any cer-

tain sum which may be adapted to the several circumstances that may occur, and have submitted it to his Majesty as their opinion that the sum to be deposited by the agent cannot be so properly determined by any person as by the colonels of each corps, whose interest, as well as regard for the service, must induce him to require a sufficient security. When I had the honour to lay this report of the board of general officers before the King, his Majesty was pleased to order that the same should be communicated to the colonels of the several corps in his service, that if any of them have omitted to require sufficient security from their agents they may be apprized of the necessity of their speedily taking that precaution, as in case of any accident, his Majesty, agreeably to the opinion of the board, must look upon the colonel as the only person accountable not only for the pay of his regiment, the regimental funds, and other money with which the agent is usually intrusted, but also for every obstruction and inconvenience which may arise to his Majesty's service from the death or failure of the said agent. I am,

BARRINGTON.

The question for the opinion of the Court is, whether under the statutes of set off or mutual credit the said sum of money received by the said bankrupt as such agent of the 49th regiment can be set off against the said sum of 1650*l.* due from the said defendant to the said bankrupt. If the Court should be of opinion that such set off cannot be allowed the verdict to stand; otherwise, a nonsuit to be entered.

Campbell, for the plaintiffs. The money received by the bankrupt from the paymaster-general cannot be set off against the sum of 1650*l.* claimed as the amount of goods sold and delivered by the bankrupt to the defendant. It is clear that the plaintiffs have primâ facie a right to maintain this action, for it is admitted that the defendant was indebted to *Gilpin* before his bankruptcy in a sum of 1650*l.* The

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onus therefore lies upon the defendant to shew that he is entitled to deduct from that, a sum of money which the bankrupt had received of the paymaster-general, in the character of regimental agent. The question upon which the right of set off depends, is whether the money received by the bankrupt from the paymaster-general can be considered as a debt due to the defendant or to the crown. If to the latter, it is manifest that the statutes of set-off, or mutual credits do not apply. Now, regard being had to the situation of the bankrupt at the time he received the money, it cannot be successfully contended that this would be a debt due to the defendant. The bankrupt was agent not merely for the defendant, but for every individual in the regiment, to whom he was accountable respectively for money received on account of each. At the utmost the defendant was only surety for the bankrupt to the crown, but in that capacity he has no claim upon the bankrupt's estate. The money received by the bankrupt and which he had not accounted for may constitute a debt due to the crown, but not to the defendant, and therefore the latter has no locus standi by way of set off. This will be more clearly proved by reference to the 45 *Geo.* 3. c. 58. By s. 21. of that statute, agents of regiments are required to make up annual accounts, and the balance due to or from the public is to be struck, and the accounts are to be transmitted to the office of the secretary at war, and a copy thereof to the paymaster of the forces. And by the 22d section, the balance admitted by the account to be due to the public, is to be considered a debt due to his Majesty of record. This statute shews clearly that the money unaccounted for in the hands of a regimental agent is a debt due to the crown, and not to the colonel, and also shews that payment by the agent to the colonel would be no discharge of the former, for he must still pay the money to the crown. It may be said on the other side, that this case does not come within the statute inasmuch as there has been no balance struck, but still not having been accounted for, whether properly paid or not, it

is money received from the crown to which the bankrupt alone is liable. If it has been properly accounted for, the defendant as surety, is discharged, but as surety (in which light alone he can be considered) he has no right of set off in this action.

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Tindal, contrà. The right of set off exists in this case either under the general statutes of set off, 2 *Geo.* 2. c. 22. and 8 *Geo.* 2. c. 24., or the 5 *Geo.* 2. c. 30. s. 28. It appears from the statement of the case, that at one time or other there was a debt due from *Gilpin* to the defendant. This is a necessary inference from the mode in which the money transactions took place between them. By the power of attorney set out the defendant appointed *Gilpin* as his true and lawful agent or attorney, for him, in his name, to ask, demand and receive money for him from the paymaster-general of the forces. It can hardly be denied, therefore, that the moment money came into the hands of *Gilpin* as agent, that was money had and received to the use of the colonel, independently of the statute 45 *Geo.* 3. c. 58. Suppose that statute had not existed, it is clear that the bankrupt as agent must have been accountable under the power of attorney, to the defendant for whom he acted. Independently of that statute, it could not be pretended that the defendant might not have dismissed the bankrupt at a moment's warning and appointed another agent in his stead. If so, he might at the same time withdraw out of the hands of the bankrupt monies received under the power of attorney. Unless, therefore, this act of parliament makes a difference in the situation of the parties, the receipt of money under the power of attorney does primâ facie import that it was a debt due from the agent to the principal, as colonel of the regiment. That view of the case is decisive of the question. By the power of attorney the bankrupt is estopped from saying that he did not receive the money as the agent of the defendant. If so, then it would be a debt due from him to the latter, for which he would be liable to an action for

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money had and received, and surely it would be no answer to such an action to say, that the defendant had not paid the money over to government. So much then as to the legal effect of the power of attorney. Then the general order of the 10th *July*, 1760, clearly shews in its very terms that the crown looks to the colonel only, as accountable for money which has been issued to the agent. Referring to both these documents, it is manifest, independently of the statute, that this was a balance due to the colonel only, and for which he had a right of action. Then the question is, whether the statute makes any alteration in the relative liability of the parties. It is contended that it makes none whatever. The 21st section only requires the agent to make up the accounts annually, but it does not in any degree vary the condition in which he stood with reference to the colonel; for when he made them up, still the balance would be a debt due from him to the latter. If, indeed, the agent had been called upon, and had actually paid the money to the government, that would be a good discharge as against the colonel, but that is not the present case. The 22nd section is conditional, for it only provides that whenever a "balance shall be *admitted* by the agent to be due to the public, the paymaster-general *may require* him to pay it into the bank, and if it be not paid, the same shall be considered as a debt of record to the crown." Two circumstances, therefore, are necessary to exist before the balance can be considered as a debt of record to the crown; first, that an account shall be sent in to the paymaster-general, on the face of which a balance shall be admitted to be due to the public; and second, that the paymaster-general has, in the exercise of his duty, called upon the agent, in vain, to pay over the balance. These circumstances do not exist in the present case, and consequently the rights of the colonel are not altered by force of the statute. The original relation in which the parties stood continued the same up to the time of the bankruptcy. Then, in every view of the case, this is not a debt due to

his Majesty, but is due to the defendant. But this is not all. The 28th section contains a proviso "that nothing therein contained shall extend to exonerate the colonel from any liability arising from any failure or deficiency of the agent." This shows beyond doubt that the colonel is debtor to the crown, and that the agent is debtor to the colonel. There may, indeed, be cases where the crown resorts to the agent in the first instance, but if there is any deficiency, the crown says to the colonel, "still you shall not screen yourself from payment by the government resorting to the agent; you shall at all events be liable for the agent's default." Looking to the whole of the act of parliament, it is simply a precautionary measure on the part of the government to enable them to have a vigilant eye over any balances in the hands of the agent, giving them an option, if they think proper, to make the agent an immediate debtor to themselves, but at all events retaining the liability of the colonel. On these grounds the defendant is entitled to set off the money, received by the bankrupt, in reduction of the present claim.

The case was argued on a former day in these sittings, when the Court took time to consider of their judgment, which was now delivered by

BAYLEY, J. This was an action to recover 1,650*l.* for army clothing, which had been furnished by *Galpin*, a bankrupt, whose assignees the plaintiffs were, to the regiment of which the defendant was the colonel. The question was, whether, by the 5 *Geo.* 2. c. 30. s. 28., the defendant was entitled to insist upon a set-off, on the ground that the bankrupt had in his hands, for the use of the regiment, from government, a much larger sum than 1,650*l.* On the part of the plaintiffs it was insisted, that the defendant stood merely in the character of a surety for the bankrupt, and that until he had paid the money, he was not entitled to set it off. On the other hand, it was insisted on the part of

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the defendant, that his character was not properly that of a surety, but that he stood in the relation of a principal, and that the bankrupt was to be considered as his agent, and that when the bankrupt received these monies from government, they were received by him in the character of agent of the defendant, exactly the same as if they had been received by the defendant himself. The relation in which the bankrupt stood to the defendant depends, as between them, on the nature of the appointment by which the bankrupt was constituted agent, either of the regiment, or of the colonel, the defendant. It may be very possible that, with reference to the public, he may stand in one relation, and with reference to the defendant, in another. The legislature regard the colonel as the person to whom they have a right to look in the first instance; but when we refer to many of the acts of parliament, we find the agent is there made amenable not only to the public, but also to the different persons in the regiment, for their portions of the money received by him, as agent, and which ought to be distributed among those different persons. The 45 *Geo.* 3. c. 59., the 23 *Geo.* 3. c. 50. s. 14., and the general Mutiny Act, certainly shew that, as between the public and the agent, and as between the individuals of the regiment and the agent, the agent is to be considered as agent for the regiment and for the individuals, and that he is amenable both to those individuals and to the public, for the sums which he from time to time receives. But, although those acts of parliament contemplate the agent as amenable both to the public and to the individuals, we are to see in what relation he stands with reference to the colonel, from the nature of his own appointment; and, in order to do that, we are to see what that appointment is. It runs thus. [Here his lordship read the power of attorney.] This is an ordinary power of attorney, in which the defendant treats the bankrupt as his constituted agent, empowering him, for him, and in his name, to ask, demand, and receive all sums of money, of whatever kind, which may be due to him: it is all to find

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its way into the agent's hands. We think, after an agent has been so constituted, by such a power, it is not competent for him to convert the right of the person by whom he was appointed into that of a surety, and to consider himself in the character of a principal in respect of the money he has received. We think he must still be considered as an agent, except only so far as the interests of the public, or of the individuals in the regiment, may make it inconsistent with the duty which he owes, either to the one or the other, that the relation of principal and agent should subsist between him and the colonel. In the present case, so far from interfering either with the interests of the public or of any individual in the regiment, it seems to us to be quite clear that the allowing the set-off in question will be beneficial to both, and, as between these parties, exactly that which the plain and common principles of honesty and justice require. The object of the present action is to take out of the pocket of the colonel, for certain clothing which had been provided by the bankrupt for the use and benefit of the regiment, 1,650*l.*, in order that the money may be applied, not for the use of the public, not exclusively for the use of any individuals in the regiment, but for the use of the general body of the bankrupt's creditors. In that case every individual in the regiment would be in the situation of a creditor, and would be entitled, as far as he had a claim upon the agent's property, to a dividend, and a dividend only: whereas, the allowance of the set-off rescues this 1,650*l.* from the general creditors, leaving it in the hands of the colonel to be appropriated by him to the purpose for which that money was originally issued. The means, therefore, of the colonel to answer this demand, and to make the regimental payments, are bettered to the extent of 1,650*l.* if the set-off is allowed; whereas, the public interests might be prejudiced if that sum of money was taken out of his hands, for he is accountable for it as a principal: it is a fund which he is bound to pay over for public purposes, or to the individuals who may have a claim upon

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it. But his means of payment are materially diminished, if this sum of 1,650*l.* is to be taken out of his pocket, and put into the pockets of the general creditors of his agent. Then, what is the justice of the case as between these particular parties? The agent has trusted the colonel with clothing to the amount of 1,650*l.*, but the colonel, on the other hand, has trusted the agent with the receipt of very large sums of money, to a much greater amount than 1,650*l.*, for which the colonel was accountable and responsible, and in respect of which he did not stand to the government merely in the character of a common surety, to answer for what the bankrupt might not duly account for, but in the character of principal debtor. Then it would be most unjust to say that the general creditors should be entitled to take this 1,650*l.* out of the pocket of the colonel, and that the colonel should be left to pay the whole of that sum. It has been said, and rightly, that as to the bankrupt, this does not discharge him from being called on by government for the payment of this money. That is very true; and if the bankrupt should hereafter be called on, he would have a remedy against the defendant to the extent to which his estate would be made liable. But, we think, he cannot require this money to be taken out of the pocket of the defendant, unless he first shews, either that he has paid government the money, or that he has redeemed the defendant from that liability to which, as colonel, he would otherwise have been subject. Before he demands justice, he ought to do justice. I have not observed upon the particular nature of this debt to the bankrupt, but I cannot help thinking that the character of the debt is a very material circumstance. It is not a debt contracted for the purposes of the defendant, but it is a regimental debt; it is a debt contracted by the defendant in his character of colonel of the regiment. The money was to be paid, not out of the private funds of the defendant, but out of the public sums which were from time to time issued for the use of the regiment; and if the bankrupt had remained solvent, the defendant would have had

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a right to give him an order for payment out of the public money, and might have said, "You are not to pay yourself for that clothing, without such an order being given." The substantial justice of the case is, that the bankruptcy of *Gilpin* should make no difference in that respect, but that the defendant should equally be entitled to the set-off. We are of opinion, looking at the form of the instrument by which, and by which alone, the bankrupt was constituted an agent in this particular case, that the defendant is entitled to treat him as his agent, and that the money he received is to be considered as received by him to the use of the defendant, except so far as the interests of the public, or of the other individuals of the regiment, would make it inconsistent with his duty to them, that such relation should exist between the parties. For these reasons, we are of opinion that the present action cannot be maintained, and the consequence is, that a nonsuit must be entered.

Rule absolute for entering a nonsuit.

The KING v. FREDERICK WING.

Two justices, by an order at special sessions, directed a footway to be diverted, under the authority of 55 G. 3. c. 68. s. 2., against which a party aggrieved gave notice of appeal, under s. 3, to the next quarter sessions. In the interval the justices gave notice to the appellant that they had abandoned the order, which had never been filed with the clerk of the peace pursuant to the statute:—Held, that the sessions had no jurisdiction to award the appellant his costs of preparing to try the appeal, either under the appeal clause of the 55 G. 3. or under s. 80. of 13 G. 3. c. 78.

AT a special sessions, holden on the 5th *March*, 1824, in the parish of *Mildenhall*, in the county of *Suffolk*, two justices made an order, under the authority of 55 *Geo.* 3. c. 68. s. 2, for diverting a public footway, within the said parish. On the 8th *April* following, Mr. *Wing* gave notice of appeal to the next quarter sessions. The order was never filed with the clerk of the peace, for the purpose of confirmation and enrolment, pursuant to the statute, and on the 28th *April*, the two justices gave the appellant notice that they abandoned the order. At the quarter sessions, which were

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holden on the 3d *May*, Mr. *Wing* applied for the costs incurred by him in preparing to support the appeal; but the justices refused the application, subject, however, to the opinion of this Court as to their power to grant such costs.

B. Andrews, in support of the order of sessions. The sessions did right in refusing to grant costs, not only on the limited ground that the order for diverting the footpath had never been filed, but on the general ground that they had no jurisdiction to allow costs, even if the order had been returned, and the appeal had been fully entered into, tried and determined. The right of appeal in this case is given by the 3rd section of 55 *Geo.* 3. c. 68. and by that alone, and the justices at sessions are thereby authorized and empowered to hear and finally determine such appeal; but no power whatever is given to award costs to either party. The 19th section of 13 *Geo.* 3. c. 78. had enacted that highways, bridleways, and footways, might be diverted by the justices at their special sessions, &c. and provided for an appeal to the quarter sessions by the persons injured by any such proceedings; but this part of the section is repealed by s. 1. of 55 *Geo.* 3. c. 68, and other provisions are introduced by s. 2., and by s. 3. the right of appeal is given, but no power to award costs is granted, nor is there a single syllable from which it can be inferred that there was any intention on the part of the legislature that costs should be given. It will probably be argued, on the other side, that s. 80. of 13 *Geo.* 3. c. 78. would authorize the justices to award costs, though no such power is given under the 55 *Geo.* 3. c. 68. s. 3.; but it is clear that this case cannot be brought within the operation of that section as to the allowance of costs. By that section it is enacted, that "if any person shall think himself aggrieved by any thing done by any justice or justices of the peace, in the execution of any of the powers given by this act, *and for which no particular method of relief hath been already appointed*, every

such person may appeal." Now this sort of case had been provided for by the 19th section, which, however, is silent as to costs, and the latter section, having been repealed by s. 1. of 55 *Geo.* 3. c. 68., and the 3rd section substituted, which is also silent as to costs, it is clear that this case cannot be brought within the 80th section of 13 *Geo.* 3. But the more decisive reason for saying that this case is not within the 80th section of 13 *Geo.* 3. is, that that section requires that the notice of appeal shall be given "within six days after the cause of such complaint arose;" and that the party shall, "within four days after such notice, enter into a recognizance to try such appeal," &c. Now here the order of justices for diverting the way was made on the 5th *March*, and the notice of appeal was not given until the 8th *April*, and no recognizance was entered into by the appellant. Upon this review of both statutes it is clear, first, that this is an appeal under the 55 *Geo.* 3. c. 68. s. 3., which is silent as to costs, and second, that supposing s. 80. of 13 *Geo.* 3. c. 78. can be pressed into the service on the other side, the appellant has not complied with the conditions of that clause.

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Dover, contrà. There are various acts of parliament relating to the highways of the kingdom, all of which must be construed in pari materiâ, and therefore if any one section can be found to comprehend this case, the Court will give it that effect. Undoubtedly the 55 *Geo.* 3. c. 68. s. 1. repeals s. 19. of 13 *Geo.* 3. c. 78. and provides that a certain form of notice shall be complied with; but as s. 3., which is the appeal clause, makes no mention of costs, recourse must be had to s. 80. of 13 *Geo.* 3., which makes a general provision applicable to all appeals under the highway acts. Unless this construction be put upon the 80th section, there would be this extraordinary inconsistency, namely, that the sessions would have jurisdiction to grant costs upon an appeal under one branch of the statute, but not under the other. [*Bayley*, J. Suppose the appellant to have given

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notice before the sessions came on, that he would not prosecute his appeal, and the respondents had incurred considerable expense in preparing to try the question intended to be litigated, what power would the justices have of awarding costs to the respondents?] Certainly it must be contended, that they would have the same power to award costs in that case, as it is submitted they have in this. The other side is driven to contend that in all cases of appeal against any thing done under 13 *Geo.* 3. c. 78. s. 19., the 55 *Geo.* 3. c. 68. must be left out of the question. [*Bayley*, J. But are you not in this difficulty, if you rely upon s. 80., namely, that you have not complied with the requisites of that section by giving notice of appeal within the time thereby limited?] The provision with regard to costs, in the 80th section, it is submitted, is a general provision, extending to every thing done under both acts. This is a case arising upon the 55 *Geo.* 3. c. 68., but the appellant, in order to entitle himself to costs, is not bound to pursue the requisites of s. 80. in 13 *Geo.* 3. In s. 3. of 55 *Geo.* 3. there is no provision as to costs, but this being a peculiar case, the general provision in s. 80, as to costs, must be construed to comprehend it, without clogging the appellant with the conditions contained in that section, which were imposed with reference to a different state of things. The grievance of which the appellant has to complain is, that after he had given a regular notice of appeal under 55 *Geo.* 3. c. 68. s. 3., the respondents thought proper to abandon the order. The appellant, therefore, could not possibly comply with the requisites of the 80th section. The appellant had prepared himself, under his notice, to try the merits of the appeal. This object was defeated by the justices withdrawing the order, and therefore it is contended that he was entitled to costs under the general provision of 13 *Geo.* 3. c. 78. s. 80.

Bayley, J.—It appears to me that the sessions in this case have acted rightly. The order of sessions is made under the authority of 55 *Geo.* 3. c. 68. which repeals

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s. 19. of the 13 *Geo.* 3. c. 78., and by s. 2. another mode of proceeding is substituted. By s. 3. an appeal is given to the sessions, but that clause is perfectly silent on the subject of costs, and standing on that section only, it is clear that no costs could be given to either party. But it is argued that under s. 80. of the 13 *Geo.* 3. the sessions are empowered to give costs in this case. Now s. 80. enacts that "If any person shall think himself or herself aggrieved by any thing done by any justice or justices of the peace, or other person, in the execution of any of the powers given by this act, and *for which no particular method of relief hath been already appointed,* every such person may appeal to the justices of the peace, at any general quarter-sessions of the peace to be held for the limit wherein the cause of such complaint shall arise, such appellant giving, or causing to be given, notice in writing of his or her intention to bring such appeal, and of the matter thereof, to the justice or other person or persons against whom such complaint shall be made, *within six days after the cause* of such complaint arose, *and within four days after such notice, entering into recognizance* before some justice of the peace within such limit conditioned to try such appeal at, and abide the order of, and with one sufficient surety *pay such costs* as shall be awarded by, the justices at such quarter-sessions." It seems to me, therefore, that in order to entitle an appellant to claim costs under the 80th section of the 13 *Geo.* 3. he must have complied with the conditions therein expressly imposed. The appellant in this case has not complied with those conditions, and therefore I think the sessions did the only thing they ought to have done.

Holroyd, J.—I think it perfectly clear that the sessions were right. They had no jurisdiction to give costs. This appeal was under 55 *Geo.* 3. c. 68. and that repealed the 19th section of the 13 *Geo.* 3. and enacted other provisions. Still the 80th section does not extend to the present case; and if it did, the appellant has not complied with the requi-

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site conditions. But I think it perfectly clear, that it does not apply to the cases which the 19th section was intended to provide for. Therefore, in every view of the case, it is clear the sessions had not jurisdiction to give costs.

Littledale, J. concurred.

Order of sessions confirmed.

Denn ex Dim W. Manifold v. Diamond.

Conveyance by father to son of a freehold estate, reciting "that he (the father) was minded and had resolved to give and assure the same to his son, as well in consideration of the natural love and affection which he entertained for his son, as also in consideration of the provision which his son had that day made by his bond or obligation in writing of 1500*l.* in augmentation of the portions or fortunes of his eight sisters;"—Held, that this was not a *sale* to the son, and that the conveyance did not require an ad valorem stamp, under 48 *G.* 3. c. 149. sch. 1.

THIS was an ejectment for certain premises in the county of *Chester*. Plea, not guilty. At the trial before *Warren*, C. J. at the last *Summer* assizes for the county of *Chester*, the case was this. The lessor of the plaintiff claimed title to the premises in question under one *William Barnes*, whose title thereto was founded on a conveyance from his father *Thomas Barnes*. The deed recited that *Thomas Barnes* being seised of the premises in fee was minded and had resolved to give and assure the same "to his son *William Barnes*, as well in consideration of the natural love and affection which he entertained for *W. Barnes*, as also in consideration of the provision which *W. Barnes* had that day made by his bond or obligation in writing of 1500*l.*, in augmentation of the portions or fortunes of his eight sisters," and then it proceeded to convey the premises to *W. Barnes* in fee. Upon the production of this deed, it was objected, that it could not be read in evidence inasmuch as it had not an ad valorem stamp, and consequently that the action could not be maintained. The objection was, however, overruled by the learned judge, and the plaintiff had a verdict with liberty to the defendant to move for a nonsuit. In *Michaelmas* term a rule nisi was accordingly obtained, against which

D. F. Jones now shewed cause, and contended that the

instrument in question did not require an ad valorem stamp. By the stamp act 48 *Geo.* 3. c. 149. sched. part I. an ad valorem duty is required to be paid for the conveyance upon "the sale" of any lands. Now the question is whether this can be considered as a *sale* of land; for if it is not, then no ad valorem stamp duty attaches. There is here neither vendor nor vendee. This is no more than a family arrangement by which the father's property is divided among his children. The father receives nothing by way of consideration for the conveyance. The property is devested, not for his benefit, but that of the children. There is here no reciprocity of interest to satisfy either the legal or popular definition of a sale. Assuming there to have been a pecuniary consideration passing, that is proved only by the recital of the bond, and then the instrument has the proper stamp required by law. If the bond be not a valid instrument, there is no pecuniary consideration whatever, and consequently no stamp would be required.

Temple and *Parke*, contrà. This must be considered as a *sale* of lands within the meaning of the stamp act. It is not essential to the definition of a sale, that the money should be paid to the grantor; it is sufficient if it be paid by the grantee. Here the consideration of the conveyance, is partly natural love and affection, and partly money secured by a bond of 1500*l.* It may be true that the bond has a proper stamp; but that does not satisfy the requisites of the statute. On a conveyance where the purchase money is 1500*l.* the ad valorem duty is 10*l.*, whereas a bond to the same amount is only 4*l.* The statute imposes the stamp duty on the principal instrument whereby the lands are conveyed. Here the principal instrument is the conveyance, which is to take effect in consideration of the 1500*l.* secured by the bond, and consequently the ad valorem duty upon conveyances attaches. The statute declares in express terms "that where any lands or other property shall be sold and conveyed subject to any mort-

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gage, bond, or other debt, or to any gross or entire sum of money, to be afterwards paid by the purchaser, such debt or sum of money shall be deemed part of the consideration in respect whereof the said ad valorem duty is to be paid." This case comes precisely within the terms of this provision.

BAYLEY, J.—It is a well settled, and I think a beneficial rule, that in all cases in which the subject is to be charged with a tax, the language of the legislature should be clear, plain, and unambiguous. In this case there is a duty imposed upon the *sale* of lands, tenements and hereditaments. The question is, whether this was a sale of lands within the meaning of the legislature, according to the rule by which such acts of parliament are to be construed. We all know in common parlance what a sale means. The seller parts with his land for an adequate price, which the purchaser pays. It appears to me that this transaction was nothing more than a family arrangement between these parties, and it does not necessarily follow from any thing that appears in this case, that there was any essential connection between the giving of the bond and the conveyance of the estate, so as to make it part and parcel of the same transaction. It is very probable that a man having a son and several daughters might say "I have no objection to my estate going to the son provided he makes an arrangement with his sisters, and gives them money in lieu of their share of the property." Probably it was upon this principle that this transaction was founded. The father says to the son "I will execute a conveyance of the estate to you provided you give a certain sum of money to your sisters." The deed in question does not import it to have been executed in consideration of money which the son had, as part and parcel of this transaction, stipulated that he would pay; nor is it mentioned in the deed, as part of the transaction, that the son had bargained to give a bond of 1500*l.* in favour of his eight sisters as a consideration. Whether it was a bargain that he should



make that provision for them, and that it was on that footing the conveyance was to be executed, this deed is silent. But I do not lay such material stress upon that, as I do upon the circumstance that in my judgment this is not to be considered as a sale, but merely a family arrangement between the parties. I by no means agree in the position, that where money is paid, it is in all cases to be looked upon as a transaction of sale. A father may in a variety of instances say, "I shall give the estate among my children. They may either take it in portions, as I direct, or they may agree amongst themselves as to the manner in which it shall be divided;" but when the father is to get nothing by parting with his estate, the transaction does not come within the notion or common understanding of the word "sale." I will put this case, (and it is by putting extreme cases that we sometimes arrive at the true character of a transaction,) suppose the father has an estate of 500*l.* a year, and he says to his son, "I will give you the estate provided you give something to your sisters." The son says, "I will give them 10,000*l.*" Will any body say, that under such circumstances the father has *sold* his estate? The true character of the transaction would be, that the son would take the estate minus 10,000*l*; and if that be so, it is impossible to say that this is a transaction of sale. On these grounds I think that this case does not come within the words of the act of parliament, as a *sale* of lands, tenements or hereditaments, and consequently the rule nisi for entering a nonsuit must be discharged.

Holroyd, J.—I am also of opinion that this deed did not require the ad valorem stamp duty imposed on the sale of lands within the meaning of the stamp act 48 *Geo.* 3. c. 148. I think that the construction to be given to this act must be the same as that given to all acts of parliament making an imposition on the subject; and I think this transaction is not to be considered as a sale of lands. A sale imports, a quid pro quo, by way of consideration, paid to

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the person selling. Now here, no benefit arises to the person selling, for the benefit arising from the transaction goes to another part of the family. It appears to me to be altogether a gift of the estate by the father to the son, part for the benefit of the latter, and the residue for the benefit of other parts of the family. On the part of the father it is nothing but a voluntary act, for which he receives no compensation which can bring the transaction under any class of cases of sale. His act is beneficial to other persons, but he receives no equivalent either mediate or immediate for the estate himself, and consequently in no sense of the word can it be considered as a sale. In one sense the son may be considered as a purchaser, but in no sense can the father be treated as a seller. He is a giver only; and as there is no mutuality of interest, I think there is no sale of the estate within the meaning of the statute.

LITTLEDALE, J. was absent.

Rule discharged.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

IN THE SIXTH YEAR OF THE REIGN OF GEORGE IV.

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Saturday, June 4.

The KING *v.* THOMAS BOND.

A quo warranto information granted against a person who had held the incompatible offices of capital burgess and town-clerk of a borough, before and since the 32 *G.* 3. c. 58. without interruption.

THIS was a rule calling on the defendant to shew cause why an information, in the nature of a quo warranto, should not be filed against him for executing the office of a capital burgess of the borough of *East Looe*, it being suggested that he at the same time held the incompatible office of town-clerk in the same borough.

Adam now shewed cause, on an affidavit that Mr. *Bond* had held both offices for a great many years, and long before the passing of 32 *Geo.* 3. c. 38. which was passed for the purpose of quieting corporations. It was admitted that when the defendant was elected to the office of a capital burgess, he had not resigned that of town-clerk, and still continued to hold both; but he submitted that this application came too late, and cited *Rex* v. *The Mayor of Helleston* (a). There the Court had refused a quo warranto after only eight years, on the ground that the complaint had not been *recent*. Here many years had elapsed before complaint made, and this being an application to the summary jurisdiction of the Court, ought not to be entertained.

(a) 3 T. R. 311. n.

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Copley, A. G. contrà, was stopped by the Court.

ABBOTT, C. J.—This is a continuing disability. It is admitted that the defendant is actually in possession of both offices. If therefore they are incompatible, which is not denied, can he be allowed to hold both? He must make his election which he will keep.

BAYLEY, HOLROYD, and LITTLEDALE, J.s concurred.

Rule absolute, with liberty to the defendant to make his election (*a*).

(*a*) See *Rex* v. *Newling*, 3 T. R. 310; and *Rex* v. *Stokes*, 2 M. & S. 71

Saturday, June 4.

The KING *v.* The MAYOR of MAIDSTONE.

The Court will not grant a mandamus to the mayor of a corporation to hold a court-leet for the purpose of administering the oath of allegiance to an inhabitant desirous of taking it.

Mandamus does not lie to allow the inspection of the records of a court-leet, unless the party assigns some satisfactory reason for the inspection.

THIS was a rule calling on the mayor, steward, and town-clerk, of the town and parish of *Maidstone*, in the county of *Kent*, to shew cause why a writ of mandamus should not issue, directed to them or other proper officer in that behalf, commanding them, at the next court-leet to be holden in and for the said town and parish in *April* next, to administer to *Thomas William Carter*, Gent. the oath of allegiance, and also to permit him, his agent, attorney or solicitor on his behalf, to have the sight and inspection of all the public books, records, entries, and papers, of and belonging to the said court-leet.

Scarlett, *Berens*, and *Tindal*, on shewing cause against the rule, were stopped by the Court.

Copley, A.G. and *Merewether*, in support of the rule, contended, first, that mandamus would lie to the mayor to hold a court-leet for the purpose mentioned. The proper

place to administer the oath of allegiance is at the tourn or leet. Every layman, above the age of twelve years, was anciently obliged to take the oath of allegiance at the *tourn* or *leet*, and it was a high contempt to refuse it: 1 *Inst.* 68. It is an imperative duty on all subjects to take the oath of allegiance to the king, and even a charter will not exempt him from taking it. In *Com. Dig. tit. Allegiance*, b. 7. it is laid down that, "By the ancient law in the time of King *Arthur*, and afterwards revived in the time of King *Edgar*, every man, of the age of twelve years or upwards, ought to have been sworn to the king in the tourn or in the leet." *Co. Lit.* 68. b. 172. b. 7 Rep. 6. b. 1 Bul. 190. Then, as to the second part of the rule, it is the undoubted right of every inhabitant to inspect the records of the court-leet, without restraint, and it is sworn to have been the invariable practice at *Maidstone* to allow the inspection of the records of the court-leet without objection. The records of this Court are open to the inspection of the public, and if the officer who has the care of them refuses, he must assign a good reason for the refusal.

Abbott, C. J.—The first part of the rule, requiring a mandamus to the mayor to hold a court-leet for the purpose of administering the oath of allegiance, is perfectly new. Such an application was never heard of before, and I am of opinion cannot now be granted. If the present applicant can be liable to any penalty for not having taken the oath of allegiance, he will be exempt from such penalty by shewing that he has offered to take it. The statute 7 *Jac.* 1. cited by Lord Chief Baron *Comyns*, which prescribes the form of the oath of allegiance, after enumerating a great number of persons who shall take it, proceeds to describe the persons before whom it shall be taken. When it comes to members of corporations it says, "aldermen, and under-officers, and every freeman of a corporation, before the chief officer, *in the open hall*." So that it perfectly negatives the proposition that the oath must be taken

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at the court-leet. Then, as to that part of the application which requires that the party shall be at liberty to inspect the records of the court-leet, I am of opinion that it cannot be granted. He does not assign any reason for such an application, but merely that it is his desire to see them. There is no suggestion that he has occasion to see them, by reason of some suit depending, in which it is necessary for his interest that he should see the records. It may be important in some instances for a party to have liberty to inspect the records of the court-leet, and upon a proper application, the Court is in the habit of granting a mandamus for such a purpose, where the inspection is refused without sufficient reason. It is said that the records of this Court are open to the inspection of anybody who may chuse to see them. That is by no means so clear. We certainly should not order any of our officers to shew a record, unless some good reason is assigned for the inspection. On the same ground I think we ought not to order an inspection of the records of a court-leet, unless the party assigns a sufficient reason: here none is assigned. As this rule seems to have been moved for as matter of experiment, I think it ought to be discharged with costs.

The other judges concurred.

Rule discharged with costs (*a*).

(*a*) See *Harrison* v. *Williams*, ante, vol. ii. 408, and *Rogers* v. *Jones*, id. 510. See also Mirror, c. 1. sec. 3 & 17; Britton, c. 12. (Kelham's Translation, 70.) fo. 72; Bracton, lib. 3. c. 10. fo. 124, b; Fleta, lib. 2. c. 52; Ld. Coke's Commentary on the 35th sec. of Magna Charta, 2nd Inst. 69; Kitchen, 6. 19. 42. 45. 84. 91. 103. 227; Powell, 19. 80; and Kielway, 141.

Saturday, June 4.

The King *v.* William Cowell.

The Court will not file a quo warranto information against one corporator for defect of title, at the instance of another whose title is equally deficient, although the latter has enjoyed his office many years uninterruptedly.

THIS was a rule calling upon the defendant to shew cause why an information, in the nature of a quo warranto, should

not be filed against him, for exercising the office of free burgess of the borough of *Huntingdon*, and the rule was obtained upon affidavits, stating that the defendant had been improperly sworn into his office, having been sworn in at the court of common-council, whereas, by the directions of the charter, he ought to have been sworn in at the court-leet.

Adam now shewed cause, upon affidavits stating that all the individuals by whom this application and the affidavits in support of it had been made, had been sworn in at the court of common-council precisely as the defendant had been; and contended, upon the authority of *Rex* v. *Cudlipp* (*a*), that they were, for that reason, incapacitated from applying for this rule; for the Court there determined that they would not permit one corporator to object to the title of another, if the objection that he makes to the title of that other be equally applicable to his own. He submitted, therefore, that the rule must be discharged.

Merewether, contrà, contended that as the relator and those who joined in the application in this case, had now held their offices for many years, the objection raised against them was taken too late, and could not be allowed by the Court to operate so as to defeat the ends of justice. He could distinguish the present case from that of *Rex* v. *Cudlipp*, because he could shew, if the argument proceeded, an ancient usage in this borough for the burgesses to be sworn in at the court of common-council. Besides, it was unnecessary on this occasion to inquire into the character of the persons applying to the Court, nor were the Court obliged to regard them as *corporators;* because they might make this application merely in the character of *inhabitants* of the borough: *Rex* v. *Bird* (*b*).

Per Curiam.—The rule laid down in *Rex* v. *Cudlipp* is a sound and wholesome rule, and one which it would be

(*a*) 6 T. R. 503. (*b*) 13 East, 367.

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very injudicious to depart from. It is strictly applicable to the present case, and therefore we are bound to act upon it, and to refuse the information now applied for. The length of time during which the relator has been holding his office, under the very defect which he now seeks to bring home to the defendant, by no means cures the objection, or entitles him to more consideration from the Court.

Rule discharged.

Monday, June 6.

In an action by the indorsee against the indorser of a bill of exchange, alleged in the declaration to have been *accepted* by *A. B.*, the plaintiff is not bound to prove the acceptance in order to entitle him to recover.

TANNER v. BEAN.

ASSUMPSIT on a bill of exchange for 22*l.*, alleged to have been drawn by one *James Challenger* upon and accepted by one *George Masters*, payable two months after date, according to the usage and custom of merchants, and by *Challenger* indorsed to the defendant, and by the latter indorsed to the plaintiff. Plea, non assumpsit. At the trial before *Littledale*, J. at the *London* adjourned sittings after last term, the plaintiff failed to prove the averment in the declaration that the bill had been *accepted* by *George Masters*, whereupon it was objected that this being matter of description, the plaintiff must be nonsuited. The learned judge, however, overruled the objection, and the plaintiff had a verdict, with liberty to the defendant to move the Court.

Chitty now moved to enter a nonsuit. The plaintiff having alleged that the bill had been accepted according to the usage and custom of merchants, by *Masters*, he was bound to prove it. He need not have alleged the acceptance, but having described it as an accepted bill, he was bound by the description. In *Jones* v. *Morgan* (*a*), where the plaintiff had unnecessarily stated that one *T. Burt* had accepted the bill according to the usage and custom of merchants, Lord *Ellenborough* was clearly of opinion that the acceptance, being stated in the declaration, must be

(*a*) 2 Camp. 474.

proved. In that case, however, it appearing that after the bill became due, one of the defendants had repeatedly promised to pay the bill, the Court held, on the authority of *Lundie* v. *Robertson* (*a*), that the promises to pay were a sufficient admission of the acceptance. Here no such promise was proved, and therefore the ruling of Lord *Ellenborough* was in point.

Abbott, C.J.—I am of opinion that this is not a description of the instrument, and that the plaintiff was not bound to prove the acceptance. The fact of acceptance or non-acceptance does not alter the obligation of the indorser, who, by his indorsement, undertakes to pay the bill if the drawer does not. The holder of a bill of exchange is not bound to present it for acceptance before it becomes due; he need not do so unless he thinks fit. If he chuses he may keep it until it is due, and if it is not then paid, the indorser is liable to him, whether the bill is or is not accepted.

Bayley, J.—I think that the allegation of acceptance cannot be considered as a description of the instrument requiring to be proved. The plaintiff's right to recover as against the indorser does not depend upon that allegation, and therefore I think it need not have been proved.

Holroyd and Littledale, J.s concurred.

Rule refused.

(*a*) 7 East, 231.

Exparte Shipdem, Gent. one, &c.

Monday, June 6.

Where more than seven years had elapsed after the settlement of transactions between an attorney and his client, the Court refused to intefere to have them re-opened, in the absence of any suggestion of fraud or misconduct.

CHITTY, last term, obtained a rule calling on an attorney of the Court to shew cause why he should not deliver up

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certain papers and writings, pay over certain sums of money alleged to be in his hands, belonging to a client, and have his bill of costs referred to the master to be taxed.

Comyn now shewed cause, on an affidavit stating that more than seven years had elapsed since the transactions in question had occurred, that the accounts between the attorney and his client had been long since settled, and that in fact there was now a balance due to the former, which he had forborne to demand in consequence of the poverty of the latter. Under these circumstances he contended, that after the lapse of so many years, it would be out of all reason to have the transactions between the parties again opened for investigation.

Bayley, J.(*a*)—Where the application comes so late, I have always understood the rule to be, that the party applying must point out some fraud in the transactions, in order to induce the Court to interfere. Here no fraud or misconduct is suggested; more than seven years have elapsed since the transactions have been closed and adjusted, and the money paid over; and therefore I think we ought not to make the rule absolute. In an ordinary case, the statute of limitations would have run, and I see no reason why, in a case where no fraud is suggested, the lateness of the application should not be an answer to it. The papers and writings in question may have been destroyed, in the belief that the transactions were finally closed and settled. Such applications as these ought to be made within a reasonable space of time.

Holroyd, J. and Littledale, J. concurred.

Rule discharged (*b*).

(*a*) *Abbott*, C. J. was absent. (*b*) See Tidd, 82. 334 et seq. 8th ed.

The KING *v.* RABBITTS and others.

Wednesday, June 8.

An order and adjudication, founded on 11 *G.* 2. c. 19. s. 4., for fraudulently and clandestinely removing goods and chattels, not exceeding the value of 50*l.*, to avoid a distress for rent, need not enumerate or specify the particular goods and chattels alleged to have been removed.

THE defendants, *John Rabbitts* the elder, *John Rabbitts* the younger, and *William Parsons*, had been convicted by two justices on the statute 11 *Geo.* 2. c. 19. s. 4.; the first named defendant of having fraudulently and clandestinely removed goods from his farm to prevent a distress for rent due to his landlord, and the other defendants of aiding and assisting him in the removal, and in default of paying double the value of the goods removed, were committed to the house of correction at *Shepton Mallett*, in the county of *Somerset*, for six months, there to be kept to hard labour, unless the sum awarded was sooner paid. The order and adjudication of the justices was to the effect following:

County of *Somerset*, to wit.

Whereas *John Rabbits* the elder, of &c. hath been duly charged before us, two of his Majesty's justices of the peace for the said county, (residing near the place where the goods and chattels *hereafter mentioned* were found, and not being interested in the lands or tenements from whence the same were so removed,) with having fraudulently and clandestinely removed and conveyed away his goods and chattels, not exceeding the value of fifty pounds, from a farm, lands and premises, called &c. in &c. now or late in the occupation of him the said *John Rabbitts* the elder, to prevent *A. B.*, at the time of such removal and conveying away being the landlord of the said *John Rabbitts*, from distraining the said goods and chattels for arrears of rent then due to him, the said *A. B.*, for the said farm, lands and premises. And whereas *William Parsons*, of &c. and *John Rabbitts* the younger, of &c. have been also duly charged before us with having wilfully and knowingly aided and assisted the said *John Rabbitts* the elder, in so fraudulently and clandestinely removing and conveying away the said goods and chattels, and in concealing the same. And we the said jus-

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tices having summoned the parties concerned, and examined the fact and all proper witnesses upon oath, and it appearing and being fully proved before us that the said *John Rabbitts* the elder did so fraudulently and clandestinely remove and convey away the said goods and chattels as aforesaid, not exceeding the value of fifty pounds, and being of the value of twenty-one pounds; and it also appearing and being fully proved before us that the said *W. P.* and *J. R.* the younger, and each of them, wilfully and knowingly aided and assisted the said *J. R.* the elder, in so removing and conveying away the said goods and chattels, as aforesaid, and in concealing the same, we, the said justices, do therefore, this &c. determine and adjudge that the said *J. R.* the elder, *W. P.* and *J. R.* the younger, respectively are guilty of the offences with which they are charged as aforesaid, and that they are hereby convicted thereof. And we do hereby order and adjudge them to pay the sum of forty-two pounds, being double the value of the said goods and chattels, to the said *A. B.* or his bailiff, servant or agent, on or before the &c.

Given under our hands &c.

Jeremy now moved for writs of habeas corpora to bring up the bodies of the defendants from the house of correction at *Shepton Mallett*, for the purpose of being discharged, for an alleged defect appearing on the face of the justices' order and determination, above set forth. The objection to the order is, that though it professes to enumerate and describe the goods and chattels supposed to have been fraudulently and clandestinely removed, yet it does not do so in fact. The order recites that *John Rabbitts* the elder had been duly charged before the justices with having fraudulently and clandestinely removed the goods and chattels "hereafter mentioned;" but there is afterwards no mention of any particular goods and chattels. Undoubtedly, as a mere *order*, which a proceeding on the 11 *Geo.* 2. c. 19. s. 4. has, in *Rex* v. *Bissex* (*a*), been held to be, it is not subject to the

(*a*) Sayer, 304. See 1 Salk. 369; Str. 996; id. 630; 2 Ld. Raym. 1406; and 1 Burn, 24th ed. by Chetwynd, 876, et seq.

same strict rules of construction as a conviction would be but it is submitted, that the order ought specifically to enumerate and describe each article of goods supposed to be clandestinely taken away, and also to state the value of each. Now, the sole dispute between the parties in this case was, to whom the goods taken away really belonged. It was, therefore, of the last importance that the goods should be specifically enumerated and described, in order that the defendants might have the advantage of trying that question upon appeal. But, by this mode of stating the order and adjudication, they are concluded, and have no other mode than the present of taking advantage of the objection. In *Rex* v. *Bissex* there was a specific enumeration and description of the goods and chattels, in the following form : "that is to say, two cows, one heifer, and ten hundred weight of cheese." The same mode of specification ought to have been observed in this instance. He was proceeding to advert to the merits of the case, when

Abbott, C. J. said—The merits are quite beside the present question. The statute does not require that the justices shall specifically enumerate, and set a value upon each article supposed to have been fraudulently and clandestinely removed, and therefore I think it is unnecessary for them so to do. Indeed, it would be most unreasonable to expect such an enumeration and valuation. It was competent for the defendants to have proved before the justices that the goods and chattels removed did not belong to *Rabbitts* the elder; and if they neglected so to do, it was their own fault. The question for us to decide is, whether the justices have shewn, upon the face of the order, sufficient matter for their jurisdiction, and have confined themselves within their jurisdiction. I think they have. All that they are required to do by the act is to find the value, but not to specify the particular goods in the order. Here they have found the value, and we are bound to presume that the justices have done right in doing that which they have autho-

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rity to do. I see no objection to the order, and if the defendants have any other remedy, it is not by this mode of proceeding.

Bayley, J.—I am of the same opinion. The form of the order follows that given in *Burn's* Justice, which appears to me to be unobjectionable (*a*).

Holroyd and Littledale, J.s, concurred.

Writs refused.

(*a*) See 1 Burn, 24th ed. by Chetwynd, 902; *Rex* v. *Middlehurst*, 1 Burr. 399.

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A defendant, in the actual custody of the Marshal upon criminal process, in consequence of an indictment in this Court, of which he has been convicted, need not be present when a motion for a new trial is made on his behalf.

CONVICTION for a conspiracy. The defendant *Hollingberry* was in custody in *Whitecross Street* prison, on civil process, and being desirous of moving for a new trial, instructed counsel for that purpose; but when the motion came on, he was not present in Court along with the other defendants, conformably to the rule in criminal cases, whereupon,

The Court said they could not entertain the motion in his absence. If, indeed, he was a prisoner in the custody of the Marshal in consequence of this indictment, it would be the same as if he were actually in Court; otherwise, though a prisoner on civil process, in other custody, he must be brought up by habeas corpus.

The case therefore stood over (*a*) until this day.

(*a*) See *Rex* v. *Fielder*, 2 D. & R. 46.

The KING, on the prosecution of JOSIAH TAYLOR, v. HOLLINGBERRY, BOWLEY, and SMITH.

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Indictment for a conspiracy to extort money. One count averred that defendants, in pursuance of a conspiracy to extort money from the prosecutor, *falsely* exhibited certain indictments against him; another count averred that defendants, in pursuance of the like conspiracy, offered to suppress an indictment pending against the prosecutor if he would give them money for so doing. The jury found the defendants guilty, generally, but found, specially, that the indictments, preferred by them against the prosecutor, were not *false*:—Held, that the averment in the former count was immaterial, and that the latter count would support the conviction. Held also, that a conspiracy to extort money is per se an offence at common law, and need not be charged to be attempted by unlawful means. Held also, that where, upon the trial of an indictment for a misdemeanour, a witness examined before the grand jury was not examined at the trial, and a witness not examined before the grand jury was examined at the trial, this was not such a surprise upon the defendants as entitled them to a new trial.

THIS was an indictment against the defendants for a conspiracy. The first count stated that defendants, intending unlawfully, fraudulently and deceitfully, to extort, obtain and procure of and from the prosecutor a large sum of money for their use, on &c. at &c. did corruptly and unlawfully conspire together to extort, obtain and procure of and from the prosecutor a large sum of money for their use, and in order to extort, obtain and procure the same, did corruptly and unlawfully conspire to indict the prosecutor for having kept a common gaming-house, &c. That defendants, in furtherance of their conspiracy, afterwards, to wit, on &c. at &c. at the quarter-sessions, &c. did *falsely* exhibit, and cause to be exhibited, a certain bill of indictment against the prosecutor, and afterwards, in pursuance &c. did corruptly, wilfully and wickedly procure and cause the said bill of indictment to be returned a true bill. That defendants, in further pursuance &c. afterwards, to wit, on &c. at &c. in the Court of *K. B.* did *falsely* exhibit, and cause to be exhibited, a certain bill of indictment against the prosecutor, and did afterwards, in pursuance &c. corruptly, wilfully and wickedly procure and cause the said bill of indictment to be returned a true bill. That defendants, in pursuance &c. afterwards, to wit, on &c. at &c. did unlawfully and wilfully endeavour to obtain and procure of and from the prosecutor a large sum of money, as and for a consideration or recompense to them for compromising and suppressing the said indictments, and giving up the further prosecution thereof.

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Second count, that defendants preferred an indictment at the quarter-sessions against the prosecutor for keeping a common gaming-house, which being removed into the Court of *K. B.* and depending there, defendants did unlawfully and wickedly conspire to extort, &c. of and from the prosecutor a large sum of money, and in pursuance &c. did unlawfully propose to the prosecutor to suppress the indictment, and to withhold certain evidence which they had and could bring forward to prove that the prosecutor had unlawfully kept a common gaming-house, if he would give and pay to them a large sum of money for their use. Third count, that defendants, wickedly intending to extort, &c. of and from the prosecutor divers large sums of money, did unlawfully and wickedly conspire to extort, obtain and procure of and from the prosecutor divers large sums of money, and in pursuance of their conspiracy did propose to compromise and suppress a certain indictment before preferred against the prosecutor by defendant *Bowley*, and then pending in the Court of *K. B.*, and a certain other indictment before preferred against the prosecutor by defendant *Smith*, then also pending in the Court of *K. B.*, and to prevent further proceedings being taken against the prosecutor thereon, if the prosecutor would give and pay to defendants a large sum of money, as a consideration and recompense to them for compromising and suppressing the last mentioned indictments, and preventing any further proceedings being taken against the prosecutor thereon. Plea, not guilty. At the trial before *Abbott*, C.J. at the adjourned *Middlesex* sittings after last term, the jury found the defendants guilty, and found also, specially, that the indictments, preferred against the prosecutor by the defendants, *were not false.*

Chitty, on the part of the defendant *Hollingberry*, now moved, in the alternative, either for a new trial, or to arrest the judgment. First, the defendant is entitled to a new trial, on the grounds of breach of good faith and surprise. The prosecutor went before the grand jury when the indict-

ment was presented, and his name appeared indorsed upon it as a witness. This was a pledge by him that he would tender himself as a witness at the trial, and his omitting so to do was not only a breach of good faith on his part, but was an injury to the defendant; to whom it might have been extremely important to cross-examine the prosecutor, and whose undoubted right it was, by law, to have the opportunity of cross-examining every witness whose name appeared on the back of the bill. It has been expressly decided, with reference to a civil action, that when a witness has once been sworn to give evidence, the other party may cross-examine him, though he gave no evidence for the party that called him; *Phillips* v. *Eamer* (*a*): and even in a prosecution for a misdemeanour, where a witness was called, and produced a document, but was not examined, the defendant was allowed to cross-examine him: *Rex* v. *Brooke* (*b*). Surely then, when a witness has been examined before a grand jury, where he cannot be cross-examined, but where his evidence has been received and has operated against a defendant, as here, he ought to appear at the trial, and subject himself to the cross-examination of the defendant there. Then, a witness named *Westmacott*, who was not examined before the grand jury, and whose name was not on the back of the indictment, was examined at the trial. This was a surprise upon the defendant, who had no reason to expect the production of that witness, and who consequently could not prepare himself to explain or refute the facts to which he deposed. Secondly, the judgment in this case must be arrested on two grounds. First, there is a fatal variance between the indictment and the evidence, for the former charges that the defendants, in furtherance of their conspiracy to extort money from the prosecutor, *falsely* exhibited two indictments against him, whereas the jury have expressly found that the indictments which they presented against him were true. Secondly, the indictment does not charge the defendants with the commission of any offence

(*a*) 1 Esp. 357. (*b*) 2 Stark. 472.

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in law. The act charged is, the conspiring to extort money. Now, money may be, under various circumstances, extorted honestly and by lawful means; as by a creditor from his debtor; and the conspiring to do an act, not in itself illegal, will not support an indictment for a conspiracy: *Rex* v. *Turnor* (*a*). Besides, the act is not charged to be done by undue and illegal means, which, for the reason already assigned, it must be: *Rex* v. *Gill* (*b*).

Abbott, C.J.—I am of opinion that no sufficient ground has been suggested for granting a new trial in this case. If *Taylor's* evidence was material for any one of the defendants, he might have subpœnaed him: I cannot say that he was bound to appear as a witness at the trial, merely because he went before the grand jury, and suffered his name to be written on the back of the indictment; nor that he was restrained from producing *Westmacott* at the trial, merely because he did not produce him before the grand jury. Neither do I think that there is any pretence for granting a rule to shew cause why the judgment should not be arrested. The indictment, in my opinion, most clearly charges a legal offence, and an attempt to commit it by illegal means. I consider the very term, "extort," necessarily to imply the adoption of illegal means; the third count, therefore, is undoubtedly good, because that states only that the defendants unlawfully conspired to extort money from the prosecutor by offering to suppress an indictment pending against him, if he would give them a sum of money as a consideration for so doing. The first two counts certainly charge that the defendants conspired *falsely* to exhibit indictments against the prosecutor. If that *must* be construed to mean that they conspired to exhibit *false* indictments against him, there is a variance, because the jury have expressly found that the indictments were not false. But, as it seems to me, that allegation may fairly be construed to mean, and I believe that it really did mean, that the defend-

(*a*) 13 East, 228. (*b*) 2 B. & A. 204.

ants falsely exhibited the indictments; that is, exhibited them not for the purposes of justice, but for false and wicked purposes of their own; which, whether true or not, is an immaterial allegation, because the question was whether they exhibited them illegally, with an illegal intent and for an illegal purpose, which the jury, after full consideration, have found that they did.

Bayley, J.—I am entirely of the same opinion. With respect to the motion for a new trial, I do not think it necessary to say anything. With respect to the motion in arrest of judgment, it is quite clear, for the reasons already given by my Lord Chief Justice, that the third count is properly framed, and is well supported by the evidence. And that is enough to support the conviction, for in a case like this, it is by no means necessary either to prove all the counts of the indictment, or to prove all the allegations of any one count. If so much of any one count is proved, as charges an offence at law, that is sufficient, and that has certainly been done here.

Holroyd and Littledale, J.s, concurred; the latter adding, that in *Comyn's* Digest, tit. *Extortion*, it would be found that extortion is described as a legal offence, per se.

Rule refused.

Wednesday, June 8.

John Evans *v.* Gwynne Gill Vaughan.

Tenant for life under a marriage settlement, with power to grant leases for years, determinable on three lives, grants a lease of part of the estate to *A.* during the life of the latter and his two sons, and the survivors and survivor, covenanting for quiet enjoyment *for and during the said term,* without interruption of lessor, his heirs and assigns, or any other person claiming any estate, &c. under him or any of his ancestors. Lessor dies, and his eldest son, who is tenant in tail under the settlement, evicts the eldest son of lessee, the third life being still in being. In covenant upon the lease:—Held, 1. That the eviction by tenant-in-tail was a breach of the covenant for quiet enjoyment; and, 2. That the *term* demised by the lease, meant a term to endure during three lives, and not merely during the life of the lessor.

Covenant for quiet enjoyment. The declaration stated that by indenture of lease, dated 24th *April*, 1786, *Gwynne*

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Vaughan, the father of the defendant, did grant, demise, &c. unto *William Evans*, the plaintiff's father, certain tenements and premises with the appurtenances, in the said indenture more particularly mentioned, to hold the same unto the said *W. Evans* and his heirs, from 29th *September* then last past, for and during the natural lives of said *W. Evans*, since dead, *John Evans*, the plaintiff, and *Thomas Evans*, sons of said *W. Evans*, and during the lives and life of the survivors or survivor, or longest liver of them, at and under a certain yearly rent and certain duties therein more particularly mentioned; and said *G. Vaughan* by said indenture did, amongst other things, for himself, his heirs and assigns, covenant, with said *W. E.* and his heirs, and every of them, that he said *W. E.* and his heirs, paying the rent and duties, and performing the covenants and agreements in said indenture mentioned, and which on his and their part and behalf were and ought to be paid and performed, "should and might, peaceably and quietly, have, hold, occupy, possess, and enjoy, all and singular said demised premises, for and during the said *term*, without the let, suit, trouble, hindrance, molestation, disturbance, or interruption, of said *G. Vaughan*, his heirs or assigns, or any other person or persons claiming, or to claim any estate, right, or interest in or to the same premises or any part thereof, by, from, or under him or any of his ancestors;" by virtue of which demise *W. Evans* afterwards, to wit, on the day and year aforesaid, entered into said demised premises, and continued possessed thereof until his death on 1st *January*, 1808, leaving plaintiff and said *T. Evans* him surviving: whereupon said plaintiff, being the eldest son and heir-at-law of said *W. Evans*, afterwards, to wit, on &c. at &c. entered into said demised premises, and became possessed thereof, until the eviction after-mentioned. That afterwards, to wit, on the day and year last aforesaid, said *G. Vaughan* died, leaving said defendant his eldest son and heir-at-law, to wit, at &c. Averment, that said *W. Evans* and said plaintiff had, severally and respectively, paid the rents and duties, and performed the covenants in the indenture mentioned on their parts

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severally and respectively to be paid and performed. Breach, that since the death of said *W. Evans*, whose heir plaintiff is, he, plaintiff, hath not been permitted peaceably and quietly to have, hold, occupy, possess, and enjoy, all and singular said demised premises, for and during the said *term*, without the let, suit, trouble, hindrance, molestation, disturbance, or interruption, of said *G. Vaughan*, his heirs or assigns, or any other person or persons, claiming or to claim any estate, right, or interest in or to the same premises, or any part thereof, by, from, or under him, or any of his ancestors; but, on the contrary thereof, said defendant, lawfully claiming an estate, right, or interest in and to the said demised premises, by virtue of a certain title thereto, to him theretofore made and derived by, from, and under the said *G. Vaughan*, after the making of the said indenture, and after the respective deaths of the said *G. Vaughan* and *W. Evans*, and before the expiration of the said term, to wit, on 1st *January*, 1816, at &c. by virtue of the said right and interest, entered into and upon said demised premises, with the appurtenances, on and upon said possession of said plaintiff thereof, and evicted said plaintiff from the same, &c.; whereby plaintiff hath not only lost and been deprived of the use, profit, and enjoyment of said premises, but was also forced and obliged to lay out and expend a large sum of money, to wit, &c. in and about the endeavouring to defend his possession of said premises. Pleas, first, non est factum; second, that defendant did not claim any estate, right and interest in and to the said demised premises, by virtue of any title to him theretofore made, and derived by, from and under said *G. Vaughan;* and third, that defendant did not enter into and upon said demised premises *before the expiration of said term*, in manner and form as is by plaintiff in that behalf alleged. Issue on these pleas. At the trial before *Abbott*, C. J. at the *Middlesex* adjourned sittings after last term, it appeared in evidence that *Gwynne Vaughan*, Esq. being seised in fee simple of a manor, advowson, lands and tenements (of which

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the premises in question were a part,) in the county of *Pembroke*, by indentures of lease and release, dated respectively 28th and 29th *October*, 1774, in contemplation of marriage, conveyed the same to trustees upon certain trusts, and among others in trust to the use of himself for life, then in trust to preserve contingent remainders, then in trust to pay an annuity of 600*l*. to his intended wife, in case she should survive him, and then to the use of the children or child of the marriage in strict settlement, with remainder over to his right heirs. The settlement contained the following leasing power:—"that it shall and may be lawful to and for all and every person and persons, being in the actual possession of all or any part or parts of the premises hereinbefore mentioned, to be hereby granted and released by virtue of any of the limitations aforesaid, by any deed or deeds indented under their hands and seals respectively, to be executed from time to time, to make any lease or leases, demises or grants, of all and every the said manor, &c. for any term or number of years not exceeding twenty-one years from the making thereof, or for any term or number of years determinable upon one, two, or three life or lives in possession, or by any way of future interest, so as the estate in the possession and future interest be determinable upon the deaths of one, two, or three person or persons, and be not to continue longer than for the lives of three persons at the most, &c." On the 24th *April*, 1786, Mr. *G. Vaughan* granted a lease of the premises in question to the plaintiff's father, to hold the same for and during the natural lives of the grantee and his two sons, *John* (the plaintiff) and *Thomas Evans*, and during the lives and life of the survivors and survivor or longest liver of them. The lease contained the covenant for quiet enjoyment set out in the declaration. The plaintiff's father died intestate on the 14th *August*, 1796, and on that event the plaintiff, as his eldest son and heir-at-law, entered into possession until the eviction complained of. In 1808 Mr. *G. Vaughan* died, leaving the defendant his only son and heir, who, under the settlement of

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1774, became entitled to and entered into the possession of his father's estates, subject to the payment of his mother's annuity. In 1815 the defendant, being advised that the lease granted by his father to the plaintiff's father was invalid, brought an ejectment for the premises, (claiming title under the settlement,) which being undefended, he obtained possession on the 9th *November*, 1816, and had since then let them to another tenant at an advanced rent. The plaintiff had incurred costs to the amount of 35*l.*, and for that sum, together with the value of the lease, the present action was brought, as damages for the breach of covenant. Three objections were taken to the plaintiff's right of recovering: first, that the lease was void ab initio, not having been made in conformity with the lessor's power, which authorized him to grant chattel leases only, whereas this was a freehold lease; second, that the defendant being tenant-in-tail, under the settlement, must be considered as claiming in his own right, and not under any title derived from his father, and consequently there could be no breach of the covenant declared upon; and third, that there was no eviction during *the term* demised, because the *term* must be construed to have expired on the death of the lessor, the first tenant for life. Upon the first point the Lord Chief Justice gave no opinion, but upon the others he observed, that if they could prevail in a court of law, it was obvious that law and justice would be at variance. The second issue on the record was, whether the defendant claimed any estate, right and interest, by virtue of any title derived from his father. Now, according to the admissions in the cause, the defendant brought the ejectment, entered the premises, and evicted the plaintiff, under and by virtue of his father's marriage settlement, so that there was a clear breach of covenant in its very terms. Then, as to the third issue, " the term" mentioned in the lease, must be understood to mean so long as the three lives for which the lease was granted continued, and consequently there was a manifest breach of covenant, inasmuch as the defendant had entered

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during the continuance of such term. The jury found their verdict for the plaintiff; damages, 1,500*l.*, the value of the lease, and 35*l.* 13*s.* 1*d.*, the amount of the plaintiff's costs at common law (*a*).

W. E. Taunton (with whom was *G. Chilton*) now moved for a new trial. There are two questions for the opinion of the Court: first, did the defendant enter the premises by virtue of any title made and derived by, from, and under his father *Gwynne Vaughan*; and second, did he enter before the expiration of the "term" granted by the lease? Upon the first point it is submitted, that the defendant cannot be said to have claimed under his father. It may be true that he claimed title under the marriage settlement, but still the question is, whether such a claim comes within the language of the covenant, as claiming "an estate, right, title, and interest, made and derived by, from and under," the lessor. The defendant claims as tenant-in-tail in his own right, and not in respect of any right derived from his father. If the title under which the defendant claims can come within the reach of such a covenant as this, it will always be in the power of tenant for life to defeat the primary object of a settlement, for he may make a lease of the settled property in such a manner as to cut off the heir. It must be admitted, however, that the case of *Hurd* v. *Fletcher* (*b*) is an authority for saying that the defendant may be considered as having claimed title under his father within the meaning of the covenant, and therefore so much reliance cannot be placed on the first as the second point. If the defendant's father, however, has been guilty of any improper concealment, whereby the plaintiff has sustained damage, that may be the proper subject of an action on the case; but in order

(*a*) The plaintiff claimed in this action the costs also of a bill in equity, filed against the defendant for a discovery, but the Lord Chief Justice was of opinion that he could not recover them. See *Calverley* v. *Parker*, Bunb. 124, and stat. 4 *Ann*, c. 16. s. 23.

(*b*) Doug. 43.

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to maintain this action it must be shewn that a breach of the covenant has been committed: *Spencer* v. *Marriott* (*a*). Then, secondly, from the manner in which this covenant is worded, it is clear that there has been no breach of it by the defendant. The covenant is, that the lessee and his heirs should and might have, hold, occupy, and enjoy the demised premises "*for and during the said term*," (not absolutely, but for and during the said *term*) without the let, &c. of the lessor, his heirs or assigns. This being a lease for lives, if it had been granted by a person competent to make such a lease, it would undoubtedly have inured during the existence of the three lives; but it cannot be disputed that this lease was not conformable to the leasing power reserved by the settlor. The lease, therefore, was absolutely null and void as against the defendant as tenant-in-tail; and it follows, as a necessary consequence, that upon the death of the settlor, who was only tenant for life, the "term" was at an end. [*Littledale*, J. The question is, whether the parties meant twenty-one years only by the words "the said term."] Unless the Court is prepared to over-rule several express authorities, which have taken the distinction between "term" and "time," it is submitted that the word "term" here only means so long as the life of the lessor shall continue. [*Holroyd*, J. But the point is, whether that distinction applies to a case of this description.] The proposition contended for on the part of the defendant is, that the "term" demised ceased on the death of tenant for life, and that the eviction by the defendant, after that event took place, was no breach of the covenant. The word "term" does not merely signify the *time* specified in the lease, but the estate also and interest that passes by that lease, and therefore the *term* may expire during the continuance of the time; as by surrender, forfeiture, and the like. For which reason if a lease be granted to *A.* for the term of three years, and, after the expiration of the said *term*, to *B.* for six years, and *A.* surrenders or forfeits his lease at the end of one

(*a*) Ante, vol. ii. 665.

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year, *B.'s* interest would immediately take effect; but if the remainder had been to *B.* from and after the expiration of the said *time*, in that case *B.'s* interest would not commence till the time was elapsed, whatever might become of *B.'s* term: 2 *Bl. Com.* 144. To this effect also is *Co. Litt.* 45, where Lord *Coke* says, "If a man make a lease for twenty-one years, and after make a lease to begin *a fine et expiratione prædicti termini* 21 *annos dimiss:* and after the first lease is surrendered, yet the second lease shall begin presently; but if it had been to begin *post finem et expirationem prædicti* 21 *annorum*, in that case, although the first term had been surrendered, yet the second lease should not begin till after the twenty-one years be ended by effluxion of time." This distinction between the words *time* and *term* is also pointed out in *Dyer*, 178; *Plowd. Com.* 198; 1 *Rep.* 153, 154; and *Bro. Ab.* tit. *Exposition des Parols.* On these authorities it is submitted that the *term* granted by the lease having ceased upon the death of the tenant for life, and as the eviction did not take place until afterwards, there was no breach within the language of the covenant; and consequently the defendant is entitled to a verdict on the third issue, which is, whether the defendant did or did not enter upon the demised premises *before* the expiration of the said term. It is clear he did not, the term having ceased and determined upon the death of tenant for life: for this *Ludford* v. *Barber* (a) and *Doe* v. *Watts* (b) are authorities. There might be very good reason for such a covenant as this, so long as the *term*, in its legal sense lasted, and it might be very proper that the lessor should bind himself not to disturb the tenant; but he had no power to bind the tenant-in-tail by such a covenant. In this respect the lease was absolutely void in its inception. This purports to be a lease for lives. Now a lease for life can only take effect by livery of seisin, covenant to stand seised, fine, recovery, or such other conveyance necessary to the transfer of estates of freehold: *Shep. Touch.* 210. Here the words of

(a) 1 T. R. 86.

(b) 7 T. R. 83.

demise are, "grant, demise, set unto farm, let." There are no words of release or confirmation. It would have no operation by the Statute of Uses. If therefore it be clear that the lease is void, so that no estate passes, then it follows that the covenant for enjoyment, being relative and dependent, is void also. It refers to the estate; it is a covenant running with the land, and is to wait upon it, and if there be no estate granted, the covenant fails altogether. *Caponhurst* v. *Caponhurst* (*a*), *Soprani* v. *Skurro* (*b*), *Northcote* v. *Underhill* (*c*), and *Knipe* v. *Palmer* (*d*).

Abbott, C. J.—It is a good rule in the construction of deeds, that they are to be so construed as to further and give effect to the intention of the parties, as it is to be collected from the instrument. This case arises upon a lease granted by the father of the present defendant to a person for the term of that person's life and the lives of his two sons, and the survivors or survivor of them; and there is a covenant on the part of the lessor, that his tenant shall peaceably and quietly enjoy the premises *for and during the said term*, without the let, suit, trouble, hindrance, molestation, disturbance, or interruption, of the lessor, his heirs or assigns, or any other person or persons claiming or to claim any estate, right or interest, in or to the same premises, or any part thereof, by, from, or under him, or any of his ancestors. The question is, what the parties to this instrument meant by the words "during the said *term*." Now I think that if we were to hold that the words "during the said term," did not mean during the lives of the lessee, his two sons and the survivor of them, but during the life of the lessor only, we should be putting a construction upon this covenant perfectly different from what the words themselves import, and most manifestly different from the intention of the parties. It is said that as the lessor had not the power to grant a lease for three lives, the term actually granted must

(*a*) Lev. 45.
(*b*) Yelv. 18.
(*c*) Salk. 199.
(*d*) 2 Wils. 130.

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be considered as inuring only during the life of the grantor. Unless we suppose that the lessor knew that he had no power to grant a lease for three lives absolutely, and that when he assumed so to do he was actually committing a fraud, we must understand that he intended to grant a lease which was to continue for three lives. This is the necessary inference to be drawn from the language of the covenant; for when a man enters into a covenant for quiet enjoyment against himself, his heirs, and all persons claiming under him, it is obvious that he means to say, "so far as my interest is concerned, or the interest of any person claiming under me is concerned, you shall hold this estate for and during the term of three lives." I therefore think, notwithstanding the distinction between the words "time" and "term," as recognized by the authorities cited, the obvious intention of the parties must prevail, and that the breach assigned has been made out by the eviction of the plaintiff before the term of three lives had expired. As to the other point, I think, after the decision of *Hurd* v. *Fletcher*, it can hardly be contended that the defendant did not claim this estate under and by virtue of a title derived from his father. In that case a fine had been levied of a feme covert's estate, with a joint power to the husband and wife to declare the uses of the fine, and the uses having been declared in remainder to *A.*, the husband made a lease, and covenanted for quiet possession against any person claiming under him. The tenant having been evicted by *A.*, it was held that an action would lie against the husband's executors, upon the covenant for quiet possession. This case is decisive to shew that the defendant was a claimant under the lessor, and that his eviction of the plaintiff amounted to a breach of the covenant. For these reasons I am of opinion that there ought to be no new trial.

Holroyd, J. (a)—I am of the same opinion. I think it must be considered that the claim made by the defendant

(a) *Bayley*, J. was absent.

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was under a title derived from the lessor, within the language of the covenant, and that we are bound so to hold on the authority of *Hurd* v. *Fletcher*. Then, as to the other point, the lessor assumes by the deed to have a right to grant a lease for the term of three lives, and I think that the expressions in the covenant must be construed with reference to what he so assumes to grant. Independently of any specific covenant, the lessor would be entitled to quiet enjoyment during the three lives, for here the word "grant" is used. Although I agree in the construction given to the word "term" in the authorities cited in argument, yet, referring to the import of the deed here, by which the lessor assumes to grant during the whole period of the said "term," I think that expression is to be construed as comprehending "time," and not "term," in its more legal signification. As to the effect of a surrender, it has been held that if an estate be surrendered and determined between immediate parties, yet the estate shall have continuance notwithstanding the surrender, to avoid a prejudice to a stranger: *Com. Dig.* tit. *Surrender*, *L.* 3. *Co. Lit.* 338. b. Here undoubtedly the party is not a stranger, but still there is no case which goes to shew that it shall not have that effect where it is the intention of the parties that the person with whom the covenant is entered into shall enjoy during the term which the lessor assumes to grant. I therefore think that the eviction of the plaintiff by the defendant, is a breach of the covenant within the intent and meaning of the parties, and that the distinction between "time" and "term" is not so to be applied as to take it out of the covenant, and give it a meaning different from the obvious meaning of the deed. In the case last put, in *Com. Dig. Surrender*, *L.* 3. it is said that if tenant for life or years grants a rent-charge during his whole term, and afterwards surrenders, yet notwithstanding the surrender, the term shall have continuance, so that it shall not defeat the rent granted, although in point of law the term during which it is to be paid is determined. Applying that doctrine to this case, it is expressly in point.

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Littledale, J.—I have no doubt that the intention of the parties was that the lessee should enjoy the estate during the whole term of three lives, and that we ought to give such a construction to the instrument as shall give effect to such intention. It is clear that the parties had agreed that the term was to endure during three lives, and having so agreed, we are bound to put that construction upon it. The case of *Wright* v. *Cartwright* (a) is very much in point with this, because it goes to shew that the word "*term*" may either signify the time or the estate granted. On the other point I concur with my Lord Chief Justice and my brother *Holroyd*.

Rule refused.

(a) 1 Burr. 281.

Pratt v. Hillman and others.

If a person bonâ fide intending to pursue the authority given by the building act, 14 G. 3. c. 78. erects a party-wall without in fact pursuing the directions of the statute, and thereby injures his neighbour, he is liable to an action, but the action must be brought after 21 days notice, and within three months after the injury done.

THIS was an action of trespass for erecting a wall on the roof of plaintiff's house. Plea, the general issue. At the trial before *Abbott*, C. J. at the *Middlesex* sittings after *Hilary* term, 1824, a verdict was entered for the plaintiff subject to the award of a gentleman at the bar. The arbitrator made his award in favour of the defendants, but reserved the following certificate for the opinion of the Court: "It appeared in evidence before me, first, that the house of the defendant *Hillman* was of the first class, and that the house of the plaintiff *Pratt*, was of the third class of buildings mentioned in the building act 14 *Geo.* 3. c. 78. s. 1, and that the two houses adjoin to each other, being separated by a party-wall. That both houses were built before the building act was passed, and are within the district over which the provisions of that act extend. That the defendant *Hillman* intended to make certain alterations in his house, and on that occasion it became necessary, in order to carry the alterations of his house into effect, that the

defendant *Hillman* should raise the whole party-wall between his house and that of the plaintiff, and that in pursuance of such intention the several defendants, in *March*, 1822, built the wall in question upon the old party-wall. That the defendant *Hillman* and the other defendants, in doing what they did, bonâ fide intended to comply with the provisions of the building act. That the wall in question was examined whilst it was building, and directions as to the mode of building it given by the regular district surveyor. That the wall as it was in fact built, was not at all conformable to the provisions of the building act. That in consequence of the old party-wall being so raised, the weight of the added part pressing on the part below, has produced considerable damage to the plaintiff's house. That before the action was brought, the plaintiff did not in compliance with sec. 100 of the building act, give the notice there required, and that he commenced his action in *July*, 1823, being after more than three calendar months had expired from the building of the wall by the defendants. I thought that this omission on the part of the plaintiff was fatal to his recovery in the action, and that the action was brought at too late a period, and awarded a verdict for the defendants on this ground."

F. Pollock having, in *Hilary* term last, obtained a rule nisi for setting aside this award,

J. Parke now shewed cause. By sec. 100 of the building act 14 *Geo.* 3. c. 78. it is enacted, "That no action or suit shall be commenced against any person or persons for any thing done *in pursuance of that act* until twenty-one days after notice in writing of an intention to bring such action has been given to the person or persons against whom such action or suit shall be brought; nor after the expiration of three calendar months next after the act committed." The only question here is whether the defendants meant bonâ fide to act in pursuance of the building act. Now

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the arbitrator has expressly found that in doing what they did, they bonâ fide intended to comply with the provisions of the act; and that the wall in question was examined whilst it was building, and directions as to the mode of building it given by the regular district surveyor. It is clear therefore that as the defendants had intended to act in pursuance of the act the plaintiff's action was out of time, and the defendants are indemnified by the 100th section. The right to build party-walls is of a public nature, and though the defendants may not have strictly conformed to the provisions of the building act, yet as they bonâ fide intended to do so, they must be considered as acting "in pursuance" of it, and are therefore protected: *Weller* v. *Toke* (a), *Gaby* v. *The Wilts and Berks Canal Company* (b). [Here the Court stopped him.]

Pollock, in support of the rule. If the 100th section of the building act is to be construed as applying to all cases, public and private, it certainly is an answer to the objection which the award of the arbitrator raises. [*Abbott*, C. J. I think it will extend to private as well as public acts, which are done in pursuance of the provisions of the statute.] In determining the present case however, it is of importance to attend to sec. 42, by which it is provided "that no party-wall shall hereafter be raised unless the same can be done with safety to such wall, and the several buildings adjoining thereto." Now, before a person takes upon himself to raise a party-wall, this provision casts upon him the responsibility of ascertaining, in the first instance, whether it can be done with safety; for if it cannot, then it does not come within the protection of the act. It is true that the arbitrator has found an *intention* to comply with the act, but at the same time he has found that the wall, as it was in fact built, was not at all conformable to the provisions of the building act. No case can be found which decides that if an act of parliament gives an authority to do one thing, and the party does

(a) 9 East, 364. (b) 3 M. & S. 580.

something totally opposite, the mere bonâ fides of his conduct is to protect him from liability. If a person has an authority to go to the eastward, and mistaking the authority, thinks proper to go to the westward, surely, under such circumstances, he cannot be said to come within the clause of indemnity. There is nothing to shew in this case that the defendants took any steps beforehand to ascertain whether the wall could be added to with safety; and if not, then it was an erection prohibited by the act, and consequently it cannot be said to be made in pursuance, but, on the contrary, in violation of the act.

ABBOTT, C. J.—I consider the 42d section of the building act as having given an authority to raise party-walls. That authority, however, must, according to the act of parliament, be executed under particular circumstances, and in a particular mode. If it be executed in the manner and under the circumstances prescribed, the owner or occupier of the adjoining house cannot complain, and the party who has done the act is justified. If, however, professing to pursue the authority given by the act, the latter does not conform to the course which the statute has required of him, he will not be entitled to complete protection, but will be liable to answer to his neighbour for the damage which he may have done. But then comes the 100th section, which limits the time within which the action shall be brought for the damage sustained. Now, as this action was not brought within the time limited, it seems to me that the arbitrator's award was right.

BAYLEY, J., HOLROYD, J., and LITTLEDALE, J. concurred.

Rule discharged (a).

(a) See post for another point decided in this case.

Wednesday, June 8.

A. held an office in the gift of *B.*, and agreed with *C.* to resign, and procure him to be appointed in his stead; in consideration of which *C.* agreed to give *A.* half the profits, and executed a deed to that effect. *A.* resigned, and *B.* at his request, but in ignorance of the agreement, appointed *C.* to the office. *A.* brought covenant against *C.* for half the profits:—Held, that the agreement was a fraud upon *B.*, and consequently illegal and void.

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THIS was an action of covenant, brought upon an indenture of agreement, dated 15th *April*, 1820, by which defendant covenanted (inter alia) to render half-yearly to plaintiff, during the joint lives of plaintiff and himself, a true account of all sums of money which he should receive, or which should come to his hands, as bag-bearer in the Pipe Office of the Court of Exchequer; and to pay to, or account with plaintiff for the fees on all Anglia accounts which had, previous to the 1st *January*, 1820, been declared by the commissioners for auditing public accounts, and were then in the Pipe Office; and to divide the net profits of the office (excepting the fees above mentioned) equally between plaintiff and himself. Breach, that defendant did not account to plaintiff for the money that came to his hands, nor for the fees on the Anglia accounts, and did not divide with plaintiff the profits of the office. Defendant, (after craving oyer of the deed, which recited that *J. Farrer*, Esq. first Secondary of the Pipe Office, had appointed defendant bag-bearer therein, upon the resignation of plaintiff, and that plaintiff resigned the office upon an understanding between him and defendant that the profits thereof, excepting the fees on the Anglia accounts, should be divided between them during their joint lives, and then contained covenants by defendant for performance,) pleaded, first, the general issue; second, that before and at the time, &c. plaintiff held the office of bag-bearer in the Pipe Office of the Court of Exchequer, the same then and still being an office touching the administration of public justice; that heretofore, to wit, &c. it was unlawfully, corruptly, and against the form of the statute in that case made and provided, agreed between plaintiff and defendant, that plaintiff should resign his office of bag-bearer in favour of defendant, and procure defendant to be appointed thereto, upon certain unlawful terms and

agreement, to wit, that the profits of the office (excepting the fees and profits on all Anglia accounts which had, previous to 1st *January*, 1820, been declared by the commissioners for auditing public accounts, and were then in the Pipe Office) should be thenceforth equally divided between plaintiff and defendant during their joint lives, and that defendant should enter into the covenants on his part in the deed contained; that afterwards, to wit, &c. in pursuance of the said unlawful and corrupt agreement, plaintiff did resign his office in favour of defendant, and did procure defendant to be appointed thereto, upon the terms and agreement aforesaid; and that for securing the payment of the moiety of the fees of the office to plaintiff by defendant, during their joint lives, defendant sealed &c. the deed, and plaintiff received the same from defendant, whereby the same was and is utterly void in law. Third plea, the same, only describing the office as one touching the receipt of his Majesty's revenue. Fourth, the same, only giving no description of the office. Fifth, that before, &c. to wit, &c. plaintiff was bag-bearer in the Pipe Office of the Court of Exchequer, which office was a public office and employment, and proposed to defendant that he would resign the same, and procure defendant to be appointed thereto on the terms in the deed contained; that upon such resignation the right of appointing a successor belonged to *J. Farrer*, Esq., and thereupon, it was, without the privity, knowledge, or consent of the said *J. F.*, corruptly, unlawfully and deceitfully, and contrary to the statute, &c. agreed between plaintiff and defendant, that plaintiff should resign his office in favour of defendant, and by recommending defendant to the said *J. F.* as a fit and proper person to succeed plaintiff in the same, and by other subtle means and devices should cause and procure the said *J. F.* to appoint defendant to the said office; and that for such corrupt and unlawful considerations, and to secure to plaintiff the moiety of the profits, as in the deed mentioned, defendant should make and seal, &c. the said deed in favour of plaintiff; concluding

as before. Sixth, that the deed was obtained and procured from defendant by fraud, covin and deceit of plaintiff. Replications,—to the general issue, a similiter. To the second plea, that the office of bag-bearer is not an office touching the administration of public justice. To the third plea, that it is not an office touching the receipt of his Majesty's revenue. To the fourth plea, (protesting that the plea is bad, and that the deed was made for a good and legal consideration, and not in pursuance of the unlawful agreement in that plea mentioned,) that the said office, before and at the time, &c. was and is in the gift of the first Secondary in the Pipe Office of the Court of Exchequer; that before and at the time, &c. *James Farrer*, Esq. was and still is such first Secondary; that upon plaintiff's resignation of the said office, the same was in the gift of the said *J. F.*; that the said office was legally saleable before the passing of a certain act of the 49 *G.* 3. entitled "An Act for the further prevention of the sale and brokerage of offices;" and that the said agreement, if any such was made, was made with the knowledge, privity and consent of the said *J. F.* To the fifth plea, that it was not without the privity, knowledge or consent of the said *J. F.*, corruptly, unlawfully, deceitfully, or contrary to the statute, agreed between plaintiff and defendant, as in that plea alleged. To the sixth plea, that the deed was obtained from defendant fairly and honestly, and not by fraud, covin, or deceit by plaintiff. Rejoinders, taking issue upon the replications to the second, third, fifth, and sixth pleas; and to the fourth, that the said agreement was not made with the knowledge, privity and consent of the said *J. F.*; and issue thereon. At the trial before *Bayley*, J. at the second *Middlesex* Sittings in *Easter* term, the jury found for the plaintiff on the first, second, third, and sixth issues, and for the defendant on the other two. Some doubt having afterwards arisen as to the mode in which the verdict was entered, the case was not moved in *Easter* term, but the learned judge, upon application being made to him for that purpose, allowed the

plaintiff to consider himself in the same situation as if he had been nonsuited, and gave him leave to move accordingly.

Denman, C. S., in pursuance of that leave, now moved for a new trial. The ground upon which the jury found for the defendant on the fourth and fifth pleas must have been, either that Mr. *Farrer* was induced to appoint the defendant to this office by means of some false or fraudulent representations made to him by the plaintiff of the defendant's fitness for the office; or that the agreement made between the plaintiff and defendant to share the profits was unknown to Mr. *Farrer*, and would, if known to him, have induced him to withhold that appointment. Now, in acting upon those grounds, the jury were clearly mistaken both in fact and in law. In point of fact no misrepresentation was made to Mr. *Farrer* as to the fitness of the defendant; he appointed him freely and voluntarily at the request of the plaintiff. There was no proof at the trial that the agreement between the plaintiff and defendant was a secret from him, and the affidavits now produced make it clear that it was perfectly well known to him. Upon that point, therefore, the jury have acted upon an erroneous view of the facts of the case, and have found a verdict against the evidence. Secondly, there was no necessity, in point of law, that the plaintiff should communicate to Mr. *Farrer* the agreement made between himself and the defendant, and as the appointment was a voluntary one, neither his ignorance or his knowledge of the existence of such an agreement could operate to render the appointment in any respect illegal. Upon either view of the case, therefore, the plaintiff is entitled to a new trial.

ABBOTT, C. J.—I think we ought not to grant any rule in this case, for I am clearly of opinion that the plaintiff ought to have been nonsuited. With respect to the question of evidence, it seems to me that the plaintiff could not establish his case without proving that the agreement was

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made with the knowledge and consent of Mr. *Farrer*, and that in the absence of positive proof upon that subject, it must be presumed that Mr. *Farrer* was ignorant of that part of the transaction. Upon that ground, therefore, independently of any question as to the nature of this office, or the legality of this bargain for the transfer of it, I have no doubt that the plaintiff failed to make out his case, and ought to have been nonsuited. But, secondly, assuming, as we must do, that the agreement was unknown to Mr. *Farrer*, I am of opinion in point of law that it was a fraud upon that gentleman, and consequently illegal and void. The office was in his gift, and he must be presumed to have intended to give all the emoluments of the office, together with the office itself, to the person whom he appointed to it; for in all probability, had he known that the profits were to be otherwise appropriated, he would have exercised his patronage in a different mode. A fraud, therefore, has been practised upon Mr. *Farrer;* in that fraud the plaintiff's cause of action originates, or at least is implicated, and, consequently, upon that ground also, he was unable to maintain his action in point of law, and ought to have been nonsuited.

The other judges concurred.

Rule refused.

The KING *v.* The BURY and STRATTON ROADS.

Where a turnpike act authorized the trustees to take at *each and every* toll-bar, on the whole line of road, a certain scale of tolls; and by another section they were authorized at a meeting, upon notice thereof, to be affixed on *all* the gates, to reduce or advance *all or any* of the tolls granted by the act:—Held, that the trustees had no authority to reduce or advance the tolls at some gates and not at others.

THIS was a rule, obtained last term, calling on the trustees of the *Bury* and *Stratton* turnpike road, to shew cause why a writ of mandamus should not issue, directed to them, commanding them to call a meeting for the purpose of

establishing an uniform rate of tolls to be taken at all the different toll-bars, toll-gates, and toll-houses, on the line of the said road, and to do all acts necessary to be done by them or any of them, for the due calling of such meeting. By an act of the 59 *Geo.* 3. entitled "An Act for repairing the road from *Shelton's Lane*, in *Bury*, in the county of *Huntingdon*, to a house formerly called the *Spread Eagle*, in the hamlet of *Stratton*, in the parish of *Biggleswade*, in the county of *Bedford*," the trustees therein named were authorized to demand and take *at each and every of the several and respective turnpikes or toll gates* standing and being erected by virtue of that act, upon the side of the said road, "for every horse, mule, ass, or other cattle, drawing any carriage, &c. the sum of 9*d.*; for every horse, mule, or ass, laden or not laden, and not drawing, the sum of 2*d.*; for every drove of oxen, cows, calves, or other neat cattle, the sum of 1*s.* 6*d.* per score; for every drove of hogs, swine, goats, sheep, or lambs, the sum of 1*s.* 4*d.* per score." By another section the trustees were authorized, "at a meeting to be holden for that purpose, whereof at least twenty-one days' notice should be given, in writing, to be affixed on all the turnpikes or toll-gates erected on the said road, and published in some public newspaper circulated in the neighbourhood thereof, from time to time, as they should think proper, to lessen or reduce, and again to raise and advance, *all or any of the tolls thereby granted*, so that the respective tolls so to be raised or advanced did not exceed the tolls by this act authorized to be taken; and so as such reduction should be made with the consent, in writing, of the several persons who should be entitled to five sixth parts of the money then due on the credit of the said tolls; and such tolls so reduced or advanced, and every of them, should be collected, recovered and applied, as the tolls thereby granted and authorized to be taken were directed to be collected, recovered and applied." The question intended to be raised by this motion was, whether, upon the true construction of the above mentioned sections, as compared together,

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the trustees had authority to reduce or advance the tolls at *some* of the gates only, or whether they were not bound to reduce or advance the tolls at all and every gate throughout the whole line of road in the same proportion.

Scarlett and *Chitty* now shewed cause against the rule. Comparing these two sections together, the sound construction of the act is, that the trustees are empowered in their discretion to reduce the tolls at such of the gates as they think proper, and are not bound to extend an equal reduction to *every* gate along the *whole* line of road. It is obvious that circumstances may arise, upon so extensive a line of road, to justify a partial reduction in some places, and an increase of tolls in others. The trustees, in the exercise of their discretion, must be governed by a regard to the quantity of traffic in some places, the proximity of gates to market towns, the difficulty or facility of procuring materials for repairing the road in other places, and other considerations of the like nature. Unless this discretion is vested in the trustees, it may happen in many instances that great hardship will be imposed, and the end of the act defeated, if the trustees, in case of reduction of tolls, are bound to extend it to every gate throughout the whole line of road. Even if this application should succeed, it will avail the parties interested in it very little, for as the trustees are not limited in their authority as to the erection of additional gates, the number may be increased, so as to effect the object which a reduction of tolls in some places is calculated to attain.

Copley, A.G. and *D. F. Jones*, contrà. If the construction contended for on the other side could prevail, it would completely defeat the intention of the legislature as expressed in precise terms by this act of parliament. In the first place, the trustees are authorized to demand "at each and every" of the several and respective toll-gates erected on the road, a certain scale of tolls. Then, by the subsequent

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clause, they are authorized, at a meeting, of which notice in writing is to be affixed on *all* the turnpike gates erected on the road, from time to time, as they should think proper, to lessen or reduce, and again to raise and advance, all or any of the tolls previously granted, and such tolls so reduced or advanced, and every of them, are to be collected in the same manner as before directed. Now, as there is nothing in this section which authorizes the trustees to reduce or advance the tolls at one gate and not at another, the plain intention to be collected from the clause is, that the reduction or advance must extend to "each and every" gate throughout the whole line of road. A very satisfactory reason may be assigned why the legislature did not think proper to vest in the trustees the discretionary power of raising or reducing the tolls at particular gates; namely, to prevent an undue exercise of their authority as it respected either their own individual interests, or those of their friends. If the trustees had such a power as that contended for, a door would be open to great abuses, and to a system extremely detrimental to the public, who are deeply interested in the due exercise of the authority given to the trustees. [Here the Court stopped them.]

BAYLEY, J. (*a*)—I think this rule ought to be made absolute. It seems to me that upon comparing the clause which authorizes the reduction of the tolls, with that which first imposes them, it is manifest that if the trustees think proper to reduce the tolls, the reduction must extend to each and every of the gates on the whole line of road, and that there is no power given to reduce the tolls at one gate and not at another. In the first place the act imposes four descriptions of tolls which are to be collected at "each and every of the several and respective turnpike or toll gates, standing and being erected by virtue of the act upon the side of the said road." The first upon every horse, mule, or ass drawing any description of carriage; the second upon the same sort of animals not drawing any carriage; the

(*a*) *Abbott*, C. J. had left the Court to attend the Privy Council.

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third upon every drove of oxen, cows, calves, &c.; and the fourth, upon every drove of hogs, swine, &c. From this it is manifest, that originally there was to be one uniform rate of tolls at all the gates upon the whole line of road. It must have been on this footing that the inhabitants residing near the road consented to have turnpike gates erected. Then comes the clause which empowers the trustees to lessen or reduce and again to raise or advance all or any of the tolls granted by the act. Before any reduction or advance can take place, a notice of the meeting of the trustees to be convened for either of those purposes is to be affixed on *all* the turnpike gates, and the tolls so reduced or advanced are to be collected as the tolls thereby granted. Now it appears to me, that as the notice is to be affixed upon *all* the gates, and as the tolls granted by the act were uniform tolls to be collected at *all* the gates, the legislature must be presumed to have intended to give the trustees power to reduce or advance all tolls, or any one of the four descriptions of tolls which they are authorized by the previous clause to collect at *all* the gates, but that they did not intend to give them power to reduce or advance the tolls at one gate and not at another. It is highly probable that if they had intended to give such a power to the trustees, some express provision for that purpose would have been introduced. As none such is to be found in the act, I think we ought to make the rule absolute for a mandamus to make an uniform rate of tolls to be taken at all the different toll-bars along the whole road.

Holroyd, J.—I am of the same opinion. I think the words "each and every" in the clause first granting the tolls, must be construed as applying also to that clause which authorizes the reduction or advancement of the tolls previously mentioned. If this were not so, the latter clause might have the effect of throwing an unequal distribution of the burthen of maintaining the road, upon those by whom it is used.

Littledale, J. concurred.

Rule absolute

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Exparte H. WILLIAMS, Gent.

The offence of brawling in a church may be the subject of a suit before the bishop's commissary, and by him transmitted to the Arches Court *by letters of request*, notwithstanding the 5 and 6 Ed. 6. c. 4. s. 1.

Pleading an issuable plea to articles in the spiritual court is no answer to a prohibition, if the spiritual judge has no jurisdiction over the matter of which he has taken cognizance.

DENMAN in *Easter* term last obtained a rule nisi for a prohibition to the Arches Court of the province of *Canterbury*, to restrain it from proceeding in a suit against Mr. *H. Williams* for brawling in the parish church of *Tring* in the county of *Herts* (*a*). The suit had, in the first instance, been instituted before the commissary of the Bishop of *Lincoln* for the archdeaconry of *Huntingdon*, within which the parish of *Tring* is situated. After it had been so instituted, the commissary by letters of request transmitted the suit to the Arches Court of *Canterbury*; whereupon the official principal of that court issued a citation, and articles were exhibited against Mr. *Williams*, who pleaded thereto, first, a negative issue, and second, a plea of justification; after which he obtained this rule nisi for a prohibition, against which,

Marryat now shewed cause. There are two questions for consideration in this proceeding, first, whether the Arches Court of *Canterbury* has jurisdiction to entertain this suit by letters of request; and second, whether, after it has been in fact entertained, the motion for a prohibition is not too late, the defendant having pleaded to the articles in chief. First, it is perfectly clear that the offence of brawling in a church is one cognizable by the spiritual courts, which have an original jurisdiction in such matters, ratione loci; *Wennouth* v. *Collins* (*b*). The statute 5 and 6 *Ed.* 6. c. 4. against quarrelling and fighting in churches and churchyards, by s. 1. enacts, that if any person shall by words only, quarrel, chide or brawl in any church or churchyard, it shall be lawful unto the ordinary of the place where the same offence shall be done to suspend every person so offending,

(*a*) Vide *Williams* v. *Glenister*, ante, vol. iv. 217.

(*b*) 2 Ld. Raym. 850.

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&c. Then the only question is whether the commissary, who acts for the bishop and derives his jurisdiction from him (*a*) may send letters of request to the Court of Arches requiring them to take cognizance of the offence. Now the stat. 23 *Hen.* 8. c. 9. s. 3. authorizes the citation of a party out of the diocese in which he resides "in case that any bishop or any inferior judge, having under him jurisdiction in his own right and title, and by commission, make request or instance to the archbishop or other superior ordinary or judge, to take, treat, examine or determine the matter before him or his substitutes." It is clear therefore that the Arches Court has jurisdiction to entertain the suit, provided the inferior judge thinks fit to transmit it by letters of request. Here it has been so transmitted, and the superior court has entertained jurisdiction over it. Then, secondly, supposing this to be a matter of doubt, still the objection comes too late, for it appears by the affidavits that the defendant has pleaded first a negative issue, (which is tantamount to the general issue in the common law courts,) and second, a plea of justification. After a party has pleaded in chief, he cannot afterwards object to the jurisdiction of the Court to entertain the matter in question: *Vanacre* v. *Spleen* (*b*).

Denman, in support of the rule. The last objection can be no answer to this application, because there is no doubt whatever, that if the Arches Court have no jurisdiction over the matter in question, the motion for a prohibition never comes too late. [*Abbott*, C. J. I believe there is no doubt of that. *Bayley*, J. If there is no jurisdiction over the matter, the circumstance of the defendant having pleaded can make no difference. The only question here is, whether the matter comes before the Court of Arches properly

(*a*) Which was ruled in this same case in *Hilary* last, when it was determined, that the commissary, being the bishop's officer, and the judge of his court, the institution of a suit before him was the same thing as instituting it before the bishop himself, and that an appeal lay directly from his decision to the Court of Arches.

(*b*) Carth. 33.

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by letters of request.] Then it would seem from the language of 5 and 6 *Ed.* 6. c. 4. that until that statute passed there was no mode of punishing the offence of brawling, and by s. 1. the jurisdiction over it is confined "to the ordinary of the place where the same offence shall be done." If this be so, then the Court of Arches can have no jurisdiction over an offence committed within the jurisdiction of the commissary of the Bishop of *Lincoln*.

Abbott, C. J—Taking it for granted that this offence was first of all created by the 5 and 6 *Ed.* 6. c. 4. still I should be of opinion, notwithstanding the words used in the statute, that the authority given to the ordinary, would be an authority to be exercised in the same manner as any other ecclesiastical authority is exercised by that officer. Now one of the modes by which the ordinary exercises his authority is by means of letters of request, calling upon the superior court to exercise its authority in the matter. But it appears from what is said in *Wenmouth* v. *Collins*, that the offence of brawling was not first created by the statute of *Edward*, and therefore that difficulty is removed. There can be no doubt then, that the authority of the Court of Arches may be exercised in the same manner in which it is exercised in other matters of ecclesiastical cognizance, and consequently this rule must be discharged.

Per totam Curiam.

Rule discharged with costs.

Greening *v.* Clark.

A. sold a quantity of lac dye, then lying in the E. I. Co.'s warehouses, to *B.*, and after being allowed to retain possession of the delivery warrants, pledged the latter to *C.* for an advance of money, and shortly afterwards became bankrupt without having redeemed the warrants. Held, that *A.* had not the possession, order, and disposition of the goods at the time of his bankruptcy within the words of 21 Jac. 1. c. 19. s. 11, and consequently the property in the warrants did not vest in his assignees.

THIS was an action of trover for certain warrants for the delivery of a quantity of lac dye. Plea, not guilty, and

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issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last term it appeared in evidence, that in *July*, 1823, a tradesman named *Phillipson* having purchased a parcel of lac dye at one of the East India Company's sales, sold it to the plaintiff. The goods were then in the company's warehouses, and the warrants for the delivery thereof remained in *Phillipson's* hands. An invoice of the goods was made out, and the plaintiff paid the purchase-money. According to the course of business at the East India House, when goods are deposited in the Company's warehouses, warrants for the delivery of them are issued to the owners. These warrants are current in the market, and are transferable at pleasure without an indorsement, and when presented at the Company's warehouses, the goods specified therein are delivered out to the bearer. On the 7th *September*, 1824, *Phillipson*, being still in possession of the warrants in question, pledged them to the defendant, for an advance of 500*l.*, with a condition that they should be restored to him as soon as the money was repaid. To this defendant assented. On the 8th *October*, 1824, *Phillipson* committed an act of bankruptcy, and on the 18th of the same month the plaintiff demanded that the warrants should be delivered up, but the defendant refused, and consequently this action was brought. On the 11th *January* last a commission of bankrupt was duly awarded against *Phillipson*. In the interval, the defendant, having sold property of *Phillipson's* in his hands, sufficient to reimburse himself for the advances he had made on the delivery orders in question, offered to give up the latter to the plaintiff, but *Phillipson's* assignees, claiming them as part of the bankrupt's estate, refused their consent. Whereupon the defendant filed a bill of interpleader, and his Honour the Vice-Chancellor made an order that the assignees should be at liberty to defend this action; and in fact *Clark* was nominally the defendant on the record. Under these circumstances it was contended that the lac dye was in the possession, order and disposition of the bankrupt within the meaning of the 21 *Jac.* 1. c. 19. s. 11. at the time of his

bankruptcy and consequently vested in his assignees. The Lord Chief Justice was however decidedly of opinion that the case did not come within that statute and directed the jury accordingly, and they having found for the plaintiff,

Copley, A. G. now moved to set aside the verdict and obtain a new trial. The question upon the evidence in this case is, whether *Phillipson* was not in the possession, order and disposition of the goods, or of the delivery warrants, which were the symbols of the goods, at the time of his bankruptcy, within the intent and meaning of the statute of *James*. It is to be recollected that *Phillipson* was a trader on his own account, and not a factor. Considering the policy of the 11th section of the statute this is clearly a case within its spirit, and consequently the property vests in the assignees. As between the plaintiff and *Phillipson*, the latter was allowed to have the order and disposition of the delivery warrants, and he was thereby enabled to gain a false credit, which is the mischief meant to be guarded against by the statute. This was in effect a visible possession; for the delivery warrants, which were the indicia of the property, were current in the market, transferable without indorsement, and the goods were deliverable to bearer. [*Bayley*, J. Can it be said that the warrants were in the actual *possession* of *Phillipson* at the time of his bankruptcy?] They were at least under his control, for he could have had them at all times by paying the money which the defendant had advanced. [*Bayley*, J. Suppose the plaintiff had given the defendant notice not to part with the warrants, would not that have determined *Phillipson's* right of possession?] No notice of that kind was here given. The warrants were clearly under the bankrupt's order and disposition. [*Abbott*, C. J. Not until he had paid the money which the defendant had advanced; and as it was not paid at the time of the bankruptcy, it cannot be said that *Phillipson* was in the actual possession.] An actual possession is not necessary. The property in the warrants was not out

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of the bankrupt; they were still under his control. [*Littledale*, J. But not until he had satisfied the defendant's lien.] Suppose the warrants were worth 20,000*l*., could it be said if they had been pledged for only 5*l*. that all control over them was suspended until the money lent was paid? [*Abbott*, C. J. I apprehend that until the money advanced was repaid, it could not be said that the warrants were in the possession, order and disposition of the bankrupt.] The only objection to that is, that the defendant had merely a lien on the warrants. If what is now said by the Court is laid down as a general rule, it will prevent a party from having "the possession, order and disposition" of goods, however small the lien may be. Surely the possession of the pawnee is, in law, the possession of the pawner. [*Bayley*, J. Could not the pawnee bring trespass for unlawfully taking away the warrants?] It is submitted not, for he had no *right* of possession; he had merely a lien upon them. The doctrine propounded by the Court would extend to cases where the smallest possible sum of money was due by way of lien upon goods. A factor's lien for commission, or a broker's lien for dock dues, would be equally within the principle suggested, and prevent the property in goods belonging to a bankrupt from passing to his assignees. [*Abbott*, C. J. Not at all; the assignees would have the same rights that the bankrupt had. All the world would know in either of the cases put, that the goods were in the hands of the factor, or remained in the docks, for a special purpose, and might be redeemed by the payment of a very small sum of money. But this is the case of a pledge, and it is quite manifest that the bankrupt could not have got at the warrants without the payment of a very large sum of money. The money not having been paid, can it be said that *Phillipson* had the possession, order and disposition of the goods *at the time* of his bankruptcy?]

ABBOTT, C. J.—It appears to me that this case is not brought within the words or spirit of the statute 21 *Jac.* 1.

c. 19. s. 11; and I think it would work enormous mischief if we were to yield to the argument which has been addressed to us by the Attorney-General. By the act of *Phillipson*, in pledging these warrants, it is clear that if he had not committed an act of bankruptcy, the plaintiff could sustain no prejudice in his right of property in them; and he might, beyond all doubt, have recovered them out of the hands of the defendant, by whom they had been improperly received. But shall we say, that because the bankruptcy of *Phillipson* intervenes, the plaintiff shall lose that right of action? Such a decision would be so monstrous, and the mischiefs resulting from it so dangerous, that I think the decision at nisi prius ought not to be disturbed for a moment.

BAYLEY, J.—I am clearly of opinion that the bankrupt, at the time of his bankruptcy, had not the possession, order and disposition of the warrants, within the words of the statute of *James*.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule refused.

BAROUGH *v.* WHITE.

The right of an innocent indorsee for value, to recover upon a promissory note, made payable to the payee, "or order, with interest, *on demand*," cannot be impeached by evidence of declarations made by the payee whilst the note was in his hands, and before indorsement, that it was given to him by the maker without consideration; nor can such a note be treated as overdue at the time of indorsement, without proof of actual presentment and dishonour.

ASSUMPSIT upon a promissory note for 300*l.*, of which the defendant and two other persons were the joint and several makers, payable *with interest on demand* to one *Arnett*, or his order, and by him indorsed to the plaintiff. Plea, the general issue. At the trial before *Abbott*, C. J. at the adjourned sittings in *London* after last term, after the usual proof of hands' writing, the plaintiff gave general evidence of dealings between himself and *Arnett*, from which

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it appeared that the latter was indebted to him at the time the note was indorsed to a considerable amount, but there was no specific proof of consideration applicable to this note. The defence set up was, want of consideration between the makers of the note and *Arnett*, the original payee; to sustain which, evidence was tendered of declarations to that effect, supposed to have been made by *Arnett* whilst the note remained in his hands, and before he indorsed it to the plaintiff. The Lord Chief Justice, however, rejected this evidence, as affording no answer to the action, inasmuch as it could not be proved that the plaintiff had knowledge of want of consideration between *Arnett* and the defendant at the time the note was indorsed. It appeared that *Arnett* was in court during the trial, but was not examined. Another point taken was, that the note being made payable "on demand," it must be treated as a bill over due in the hands of the plaintiff, and consequently that he could maintain no action upon it; and *Banks* v. *Colwell* (*a*) was cited; but the Lord Chief Justice overruled the objection, and the jury, under his lordship's directions, found for the plaintiff, but both points were reserved.

Cross, Serjt. (with whom was *Chitty*) now moved for a rule nisi to enter a nonsuit, or for a new trial. First, the evidence of declarations, made by *Arnett* whilst he was yet the holder of the note, were improperly rejected. Upon this point *Pocock* v. *Billing* (*b*) is a direct authority, for there *Best*, C. J. is reported to have said "such declarations are admissions, and as such, receivable only when they are supposed to be adverse to the interest of the party." Now it is clear that at the time *Arnett* made the admissions of which evidence was tendered, such admissions were adverse to his interest, and, on the authority of the case cited, admissible. Second, assuming that it was necessary to shew, in the first instance, that the plaintiff knew that *Arnett* had

(*a*) Cited in *Brown* v. *Davis*, 3 T. R. 80.

(*b*) 2 Bing. 269; 8 J. B. Moore, S. C.

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given no consideration for the note, at the time of the indorsement, still this being a note payable "on demand," it stands on the same footing as a note overdue, and consequently no action lies against the maker, whatever remedy the indorsee may have against the indorser. In *Banks* v. *Colwell*, tried before *Buller*, J. it was held that a note, payable on demand is to be considered overdue; and *Brown* v. *Davies* (a) is an authority to shew that where a promissory note, after it was due and had been noted for non-payment, was indorsed to the plaintiff, who sued the maker upon it, the latter was entitled to go into evidence to shew that the note was paid as between him and the original payee from whom the plaintiff received it. If this be so, then it was unnecessary to shew that the plaintiff knew of the want of consideration between *Arnett* and the defendant at the time of the indorsement, for as the plaintiff derives title through *Arnett*, whatever would be an answer to an action by the latter, would be equally available against the former.

BAYLEY, J.—I think the declarations supposed to have been made by *Arnett* were not receivable in evidence. In no case can the declarations of a party who is alive and may be called as a witness, be received to affect a third person, unless the latter is identified with such declarations. Now, in this case there was nothing to identify the plaintiff with *Arnett's* declarations. If such declarations were receivable in evidence, the result would be, that in the case of every negociable security it would be competent to the maker to impeach the right of the person holding it, by the declarations of the preceding holder, which would be, undoubtedly, a great clog upon the negociability of instruments of this description. Had the plaintiff, indeed, been identified with *Arnett*, by shewing that he had taken the note without consideration, or after it was due (when it might be deemed and treated as a dishonoured note,) the case

(a) 3 T. R. 80.

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would stand upon a very different footing. But here there was, in the first place, no evidence to shew that the plaintiff had not given consideration for the note. On the contrary, the evidence, as far as it went, imported that he had given consideration, and was a bonâ fide holder for value. Then, secondly, was this to be treated as a note overdue? Certainly this is not like the case of *Brown* v. *Davies*, for there it was only decided that where a party takes a bill or note overdue, he takes it on the credit of the indorser; but in that case there was evidence to shew that the note had been presented for payment, and dishonoured before it was indorsed to the plaintiff. It is said that in the case of *Banks* v. *Colwell*, Mr. Justice *Buller* treated a note payable on demand as a note taken by an indorsee after it was due. We are, however, unacquainted with all the circumstances of that case. It is very possible that in that case there was evidence to shew that the note had been presented and dishonoured before indorsement. Wherever it appears that a bill or note has not been indorsed until some time after it is due, (which shews that the transaction is out of the usual course of business,) that circumstance excites so much suspicion, that it must be considered that he takes on the credit of the indorser, and not upon that of the person by whom it appears to be made payable. But in this case there was no evidence whatever of a demand and refusal to pay before the indorsement. The note is made payable "*on demand, to Arnett, or order, with interest*," which imports that it was not the intention of the makers of it that it should be promptly paid, but that it should lie in the hands of *Arnett*, or of such other persons as should take it from him for valuable consideration, until either he or his indorsee should think fit to call for payment, or until the maker should find out who the holder was, and require him to receive payment. On these grounds I think, that as *Arnett* was not identified with the plaintiff, the declarations of the former were not admissible in evidence to impeach the the title of the latter to recover.

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HOLROYD, J.—I am also of opinion that the declarations of *Arnett* were not receivable in evidence, there being nothing to identify him with the plaintiff. The only ground upon which they could be received is, that they are against the interest of the party making them; but it is a general rule that such declarations must be proved by the party himself, if he be living. That is a sound rule of law. Here *Arnett* was living, but his evidence was not tendered, even supposing it to be admissible. As to the other point, I think this is not to be treated as a note overdue at the time of the indorsement. If a person takes a note, payable at a particular time, and that time is past at the period when he receives it, he takes it at his own risk. But where a note is made payable "on demand, *with interest*," that imports that it is to continue negociable until it is presented for payment. Here there was no proof that the note was presented and dishonoured before it was indorsed to the plaintiff, and consequently the objection taken to the plaintiff's right to recover has no foundation.

LITTLEDALE, J.—I also think that *Arnett's* declarations were inadmissible. The general rule is, that if the person, whose declarations are proposed to be given in evidence, be alive, he must be called as the witness to prove them. To this rule there are some exceptions; as, for instance, where the party making the declarations can be identified with the person against whom they are offered. But where a contract is made by an agent, his declarations cannot be received without calling him, unless he be dead. So also the declarations of a tenant as to the terms of his holding, or of a steward, cannot be admitted until after death. Then, as to the other point, I think that a promissory note, "payable on demand, with interest," is to be considered as a continuing security, and cannot be treated as dishonoured, until it has been in fact presented and dishonoured.

ABBOTT, C.J.—I am of the same opinion with my

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learned brothers on both points. I will only make one remark as to the case in C. P. of *Pocock* v. *Pilling*. The decision of the Court in that case was only that the evidence was inadmissible, it not appearing that the party making the declaration, at the time of making it, was the holder of the instrument. That was the only point in judgment. What was said by the Lord Chief Justice as to the admissibility of such declarations, made by a person who was holder of the instrument at the time of the declaration, is to a certain degree extra-judicial; and observations not strictly applicable to the point sub judice, but made by way of statement or illustration, are entitled to less weight than those which are made upon the best care and attention, with reference to the point under consideration.

Rule refused (*a*).

(*a*) Vide *Smith* v. *De Witts*, ante, 120.

An agent for a plaintiff attorney, dying intestate and insolvent, pending a suit, has a lien for his costs upon a postea, of which the former has obtained possession after the death of the intestate.

Death of a principal attorney, pending a suit, does not revoke his agent's authority to obtain possession of a postea, after verdict found for the former.

TAUNTON (deceased) *v.* GOFORTH.

THIS was a rule calling on Mr. *Jeyes*, an attorney of this Court, to shew cause why he should not deliver up to *J. Stoody* and *G. Aldham*, administrators of *J. Taunton*, deceased, the postea in a certain feigned issue, directed, by the Court of Exchequer, to be tried in a suit for tithes, in which their intestate was plaintiff, and *Goforth* and others defendants. Mr. *Jeyes* had been employed by Mr. *Taunton*, an attorney of this Court, as his agent to conduct the suit in question. The feigned issue was found in the plaintiff's favour, and after his death Mr. *Jeyes* obtained possession of the postea, which he now retained in his possession, claiming a lien thereon for the costs due and owing to him as agent in the conduct of the suit in the Exchequer and the trial of the issue at law. After the death of the plaintiff,

(who died in embarrassed circumstances) his administrators revived the suit in the Exchequer, but employed another solicitor in the conduct thereof; and on the 23d *December* last, a decree was made for an account of the tithes claimed by Mr. *Taunton*, with the costs of the suit and the costs of the issue at law. Two questions were now raised; first, whether the death of Mr. *Taunton* did not operate as a revocation of Mr. *Jeyes's* authority as agent, so as to deprive him of the right of obtaining possession of the postea; and second, whether, supposing him to have a lien, it must not be confined to his bill of costs, claimed in respect of the trial of the issue at law.

After hearing *Carter* for the administrators, and *C. F. Williams* for Mr. *Jeyes*,

ABBOTT, C. J. said—We do not think that the death of Mr. *Taunton*, pending the suit, was a revocation of his authority as agent, so as to prevent him from doing that which it was for the interest of the person whom he represented should have been done, namely, to have obtained possession of the postea. Then, with respect to Mr. *Jeyes's* lien, we think he has at least a lien upon the postea for the costs of the trial of the issue. Whether he has a right to anything more must depend upon what has passed between the parties. Let that question, and the mode of making out Mr. *Jeyes's* charges, be referred to the Master; and, subject to such reference, this rule will be made absolute.

PER CUR. Rule absolute (*a*).

(*a*) Vide Montague's Law of Lien, 53, 55, and 71; 3 Atk. 720; and 1 M. & S. 535.



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BARROW, Administratrix, *v.* CROFT.

MARSDEN *v.* SAME.

Thursday, June 9.

Where a judgment had been docketed by the proper officer in due time, but the judgment-roll was not carried in until twenty-five years afterwards, the Court refused to have it taken off the file, notwithstanding the R. E. 5 *W.* & *M.*

MANNING, on a former day, obtained a rule calling on the plaintiff in the first mentioned case, to shew cause why the judgment-roll therein should not be taken off the file of the Court, on the ground that it was not brought in until twenty-five years after the judgment had been obtained, contrary to the rule of *Easter* Term, 5 *W.* & *M.* (*a*).

D. F. Jones now shewed cause on affidavit, stating that judgments had been obtained in both actions in *Hilary*, 1799, and that in the first the roll was marked and docketed by the proper officer at the time, the number of the roll obtained, and the fees paid, although it was not filed until *Michaelmas* term last. He contended that the rule of court 5 *W.* & *M.* was not compulsory. In practice the rule is not strictly observed, and rolls are often received after the time mentioned therein, without the leave of the Court, upon paying a post terminum fee to the officer. Here the judgment was actually docketed at the proper time, and therefore no prejudice could arise to a purchaser, unless in consequence of his own negligence; for this was notice to him of the existence of the judgment obtained by the first plaintiff. In the case of *Odes* v. *Woodward* (*b*), relied upon on the other side, the judgment was *not docketed*, and that was one of the reasons (according to the report of the case in *Salk.* 87, 3 *Salk.* 116,) why the Court refused to permit

(*a*) By which "every attorney ought to bring them (the rolls) into the office of the clerk of the Treasury, fairly engrossed, by the following times; that is to say, the rolls of *Trinity*, *Michaelmas*, and *Hilary* Terms, before the essoin day of every subsequent term, and the rolls of *Easter* before the first day of *Trinity* term." Vide Tidd, 788, 8th ed., and Archbold's Pr. 206.

(*b*) 2 Ld. Raym. 849.

the filing of the roll. Here it was docketed, and no purchaser could be affected. But in point of fact the plaintiff in the second of these actions was not a purchaser, nor could he in any respect be considered as such.

Manning, contrà. The judgment-roll cannot be brought in, after twenty-five years have elapsed, without the special leave of the Court. If this be not so, it is impossible to say where the limit of time in this respect is to stop, and the rule of 5 *W.* & *M.*, which is sufficiently positive in its terms, will be altogether nugatory. According to the report of *Odes* v. *Woodward*, in Lord *Raymond*, the Court held "that by the course of the Court, all rolls of the former term ought to be brought into the office before the essoin day of the subsequent term; and ought to be bound in the bundle of rolls of the former term; and that is the reason why all acts before the essoin day of the subsequent term are looked upon as the acts of the term precedent; and a roll cannot be brought in and filed *post terminum* without the leave of the Court." In that report of the case, no notice is taken of the fact that the judgment was not docketed. But that makes no difference when the object of the rule of Court is considered. Here, the plaintiff in the second action being a judgment creditor, he must be considered in the same situation as a purchaser, and may therefore have been prejudiced by neglecting to bring in the roll.

ABBOTT, C. J.—I am of opinion that this rule must be discharged. According to the long established practice, as certified to us by the officers of the Court, what is now complained of, may be done. Here no purchaser could be prejudiced, because, upon inquiring at the office, it would be found that the judgment had been regularly docketed at the proper time; and that would be a sufficient notification to him not to pay his money. If indeed a purchaser takes an estate, thinking there is no judgment existing, and it turns out that there is a judgment after he has paid his money,

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then indeed he might be prejudiced; but that is quite a different case from this; for here it cannot be said that a judgment creditor is in the same situation as a purchaser. There is really no difficulty in the case; but we think that attornies should take care to carry in their rolls promptly. Negligence in this respect causes a great deal of expense, and occupies much of the time of the Court unnecessarily; and in order to express our sense of the negligence in this instance, we shall discharge the rule without costs.

BAYLEY, J.—The circumstance of the judgment having been docketed in proper time, seems to me to make all the difference. If there had been a purchaser here, and he had searched at the office, he would have found that the judgment had been docketed, and thus he could have sustained no prejudice; but if a purchaser had complained that he had searched, and could not find the roll, then, with reference to him, the Court might make a special order to have the roll taken off the file, if it had been put on afterwards; but here the party applying does not shew that he is entitled to relief. It will be found in practice, that rolls are brought in with post termini according to the number of terms that have elapsed.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule discharged, but without costs.

In an action for goods sold and delivered, the Court will not compel a defendant to allow an inspection of the goods to enable the plaintiff to give evidence of identity, &c.

DELL v. TAYLOR and another.

THIS was an action for a quantity of copper plates, alleged to have been sold and delivered by the plaintiff to the defendants.

Steer moved for a rule, calling on the defendants to shew

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cause why they should not permit the plaintiff and his witnesses to inspect the copper plates in question, for the purpose of identifying the same, and giving evidence thereof at the trial. The ground suggested for the motion was, that the plates had been executed in great haste, and delivered personally by the plaintiff to the defendants, and therefore without the assistance of the Court to compel the defendants, to produce the goods for the inspection of the witnesses, the plaintiff could not safely proceed to trial, the defence anticipated, being that the work was improperly executed.

BAYLEY, J. (a).—This is an application of the first impression in a court of law. No instance is to be found in which the Court has ordered an inspection to either party to a suit, of any thing which is not the common property of both. This is not like the case of an agreement, to which either of the contracting parties may have access. Application may be made to the defendant for leave that the plaintiff's witnesses shall have an inspection of the goods, and if he refuses, that circumstance may be given in evidence; but I am not aware of any instance in which a defendant has been compelled by this Court to give evidence out of his own hands to affect himself. Terms may always be imposed on a plaintiff, but it does not always follow that a defendant is under the same liability unless he applies for a favour. If the plaintiff is entitled to any relief it is only in equity.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule refused.

(a) *Abbott*, C. J. was absent.

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Thursday, June 9.

Where defendant under a judge's order undertook to plead within a given time, and did not plead within that time, the Court held that plaintiff was entitled to sign judgment without giving a rule to plead.

NIAS v. SPRATLEY.

UPON a rule for setting aside a judgment for irregularity, it appeared, that by a judge's order, dated 16th *April*, upon payment of debt and costs on or before two o'clock on the following *Wednesday*, all further proceedings in the action were to be stayed, the defendant agreeing, in default of such payment, to receive a declaration and to plead thereto within the first four days of the ensuing term. Default having been made in the payment, a declaration was delivered, and the defendant having neglected to plead within the time agreed upon, the plaintiff signed judgment, without giving a rule to plead.

Chitty shewed cause. It is laid down by Mr. *Tidd*, who refers to the rule of court *T.* 5 and 6 *Geo.* 2. upon the subject, that "before the plaintiff can sign judgment, the defendant must have *notice* to plead; and unless he be bound by rule of court, or order of a judge, to plead by a time therein limited, a *rule* to plead must be entered in all cases, whether the defendant have appeared or not; and where he has appeared, there must also in general be a *demand* of a plea" (*a*). The defendant here comes within one of the exceptions there mentioned, for he was bound by a judge's order to plead by a time therein limited. The practice upon this point is the same both in this court and in that of C. P. In *Pearson* v. *Reynolds* (*b*) this court held that "after a judge's order obtained by the defendant for time to plead, and no plea within the time, the plaintiff may sign judgment as for want of a plea without a demand of it." In *Towers* v. *Powell* (*c*) the court of C. P. held that "where time to plead is given, no rule to plead is necessary;" and in *Cardozo* v. *Hardy* (*d*) that where the defendants had

(*a*) Tidd's Prac. 8th ed. 480: vide 1 Archbold, 131. 2d ed.

(*b*) 4 East, 571. (*c*) 1 H. Bl. 8. (*d*) 2 J. B. Moore, 220.

obtained a judge's order for time to plead, the plaintiff might sign judgment without either a rule to plead or a demand of plea. Nor is this new practice, for in an old edition of the rules and orders of K. B. and C. P., it is said in a note to this very rule of court, *T.* 5 and 6 *Geo.* 2., "If a defendant is bound by rule or order of court, to plead by a time therein limited, it is incumbent on him to plead by such time, although the plaintiff does not enter any rule to plead, or call for a plea" (*a*).

Archbold, contrà. The doctrine laid down by Mr. *Tidd* is not supported by the authorities he quotes. With one exception, namely, *Starkie* v. *Wilkes* (*b*), they were all cases decided in the court of Common Pleas, and the practice of that court differs materially in this respect from the practice of this court. In the common pleas no rule for judgment is necessary; but in this court a rule for judgment must be obtained before judgment can be signed; and a rule to plead is equivalent to a rule for judgment.

BAYLEY, J.—I am clearly of opinion that it was not necessary for the plaintiff to give any rule to plead in this case. The notes to the rule of court, which Mr. *Tidd* cites in support of his position, are of considerable authority in themselves, and have been adopted by all the modern books of practice. It was held in *Brandon* v. *Payne* (*c*) that plaintiff may sign judgment if defendant plead in abatement after the four days, although no rule to plead has been regularly served, the reason of which applies to this case, because the ground of that decision was that a party may dispense with a rule to plead, and that he had there done so by pleading in abatement. So it was held in *Perry* v. *Fisher* (*d*) that the irregularity of giving a rule to plead before the delivery of the declaration, is waived by putting in any plea, though a nullity. Here the defendant under-

(*a*) Rules and Orders, 2d ed. 1747, in notis.
(*b*) Cromp. Pr. 166. (*c*) 1 T. R. 689. (*b*) 6 East, 549.

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took to plead within the first four days of the term, which was virtually an agreement to dispense with a rule to plead; and upon that ground I think the plaintiff has been regular, and that this rule ought to be discharged.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule discharged.

Friday,
June 10.

Where a lease was dated 25th *March*, 1783, habendum "from the 25th *March now last past*," and it was proved that the deed was not executed until some time after the date.—Held, that the term commenced on the 25th *March*, 1783, and not on the 25th *March*, 1782.

STEELE *v.* MART.

THIS was an action of debt for the use and occupation of certain premises in the parish of St. *Mary-le-Bone* in the county of *Middlesex*. Plea, the general issue. At the trial before *Abbott*, C. J. at the adjourned *Middlesex* sittings after last *Michaelmas* term the case was this:—By indentures of lease purporting to have been made on 25th *March*, 1783, between *William Gooding*, the elder, *William Gooding*, the younger, *James Gooding* and *Sampson Gooding* of the first part, and *John Walker* of the second part, reciting that in consideration of the rents and covenants therein contained, on the lessees part to be paid and performed, and of the surrendering and giving up to be cancelled certain indentures of lease made between the same parties, bearing date 10th *April*, 1776, whereby the messuage or tenement, with the appurtenances thereinafter demised and leased to the said *John Walker*, were demised for a term of thirty-five years, from *Lady-day* then last, lessors demised the premises therein particularly described, which were stated to be then in the tenure and occupation of the said *J. Walker* or his undertenants, &c. to hold the same from the feast day of the Annunciation of the Blessed Virgin *Mary*, *then last past*, for and during, and unto the full end and term of thirty-five years, then next ensuing and fully to be complete and ended, paying during the said term of thirty-five years, unto the said *W. Gooding*, the elder, and his

assigns, if he should so long live, the yearly rent of 60*l.* on the 24th *June*, 29th *September*, 25th *December*, and the 25th *March*, by even and equal portions; and if the said *W. Gooding*, the elder, should happen to die before the expiration of that demise, then paying during the remainder of the term from his death, to the said *W. Gooding*, the younger, *J. Gooding*, and *S. Gooding*, their respective executors, &c. the yearly rent of 60*l.* on the before lastmentioned days of payment, the first payment to be made on the first of the said feast-days, which should happen after the decease of *W. Gooding* the elder; yielding and paying also during the aforesaid term of thirty-five years, unto *W. G.* the younger, *J. G.* and *S. G.* their executors, &c. the further yearly rent of 15*l.* at the beforementioned days of payment, the first payment thereof to begin and be made upon the 24th day of *June next* ensuing the date thereof. Usual covenants for payment of rent, repairs, &c. The lease was attested in the usual manner, and near to the attestation was the following memorandum signed by all the lessors :—"We whose names are under-mentioned do agree to the within writings, that the said *John Walker* for the space of thirty-five years is to pay 60*l.* per year, neat money; and to prevent any dispute which might arise, we have indorsed the same from *Lady-day*, 1783." On the back of the deed was the following indorsement: "Dated the 10th *May*, 1783." By an under lease made on the 17th *December*, 1787, *Elizabeth Lorymer Walker*, daughter of *John Walker* the original lessee (who had died in the interval) demised the premises to *Joseph Dale*, habendum from the feast-day of the birth of our Lord Christ, then next ensuing, for the term of twenty-nine years, and one quarter of a year, wanting three days, at the yearly rent of 124*l.* payable quarterly. It appeared that the plaintiff had married *E. L. Walker*, who had since died, and that the defendant had been in possession of the premises in question by assignment from *Joseph Dale* from the 25th *March*, 1817, until the 28th *March*, 1818. Under these circumstances it was objected

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on the part of the defendant that the plaintiff had no interest in the premises during the time for which the action was brought, and consequently this action could not be maintained. The orginal lease purported to be made on the 25th *March*, 1783, habendum from the 25th *March* then *last past*, which must mean 25th *March*, 1782, so that the term of thirty-five years had expired on the 25th *March*, 1817, after which the plaintiff had no interest in the premises. The Lord Chief Justice was however of opinion that the lease must be construed as taking effect from the day of its execution, which being after the 25th *March*, 1783, was an answer to the objection. A verdict was found for the plaintiff subject to a motion to enter a nonsuit. *Marryat* having in *Hilary* term obtained a rule nisi,

Gurney (with whom was *Tindal*) now shewed cause. The original lease must necessarily be construed as taking effect, not from *Lady-day*, 1782, but *Lady-day*, 1783, for otherwise the obvious intention of the parties would be defeated. It may be true that the lease in fact bears date on the 25th *March*, 1783, and that the habendum is from *Lady-day* "*then last past*," but it is manifest from the memorandum near the attestation and the indorsement on the deed that it was intended to take effect either from the 25th *March*, 1783, or from the 10th *May* in that year. If it be clear that the lease was executed after the day it purports to bear date, it is to be construed as taking effect from the day of its execution: *Clayton's* case (*a*). Now both the memorandum and the indorsement are evidence that it was not executed until after the day of the date. The parties could have no assignable motive for ante-dating the lease, for *Walker* the lessee was at the time this lease was granted actually in possession of the premises under another lease from the same parties, several years of which were then unexpired. It is highly probable that when the

(*a*) 5 Rep. 1.

parties met to execute the indentures, the date "25th *March*, 1783" had been inserted; and therefore in order to prevent disputes the lessors signed the memorandum which appears near the attestation. If there could be any doubt upon the point, it is removed by the stipulation respecting the payment of the further yearly rent of 15*l.*; for it is covenanted, that the first payment thereof shall be made on the 24th day of *June* "next ensuing the date" of the lease. [He was here stopped by the Court.]

Marryat and *Campbell*, contrà. The Court must hold that the original lease expired at *Lady-day*, 1817. It cannot be doubted that the habendum is from *Lady-day then last past*. The *Lady-day* then *last past* would be the 25th *March*, 1782, for the lease bears date the 25th *March*, 1783. Extrinsic evidence is inadmissible to explain a deed where there is no obscurity on the face of it. The Court is to look to the habendum, and if that be clear and explicit, no collateral matter can be read to explain its meaning, and shew that a different date was intended by the parties. The attestation relied upon on the other side is applicable rather to the time when the lease was indorsed, than to the time of its execution, and nothing can be inferred from the indorsement which can have any operation upon the body of the instrument. If there had been any latent ambiguity in the habendum, then the Court might look to other parts of the deed, in order to effectuate that which might appear to be the reasonable construction, but here no ambiguity exists. The memorandum near the attestation is itself of very doubtful import, and certainly does not control the language of the habendum. What proof is there that the lease was in fact executed after it purports to bear date? No evidence was given at the trial to shew when the memorandum and indorsement were made; and therefore the Court cannot presume that they were made at a later period in order to contradict the express terms of the instrument

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itself. But, assuming that they were made afterwards, they cannot control the term demised by the lease.

ABBOTT, C. J.—There is no doubt, the lease will take effect from the day of the delivery, and the term will begin to run from the *Lady-day* which preceded the delivery and not from the *Lady-day* previously stated at the commencement of the instrument. We are therefore to see whether there is any satisfactory proof that this instrument was executed after *Lady-day*, 1783, for if there was, then "the feast day of the annunciation of the Blessed Virgin *Mary then last past*," will be the feast of the annunciation in 1783. Was there any such evidence? I thought at the trial that there was abundance of most satisfactory evidence upon that point. Looking at the first lease, it purports to have been made on the 25th *March*, 1783, in consideration of the rents and covenants which it contained, and of the surrender of a previous lease which had then many years to run, and then demises the premises to the lessee to hold "from *Lady-day* now *last past*." It is not a very common thing to make a lease commence from the year preceding its execution, and certainly in this instance there could be no satisfactory reason for doing so, as the lessee's former term had not expired, and it is probable that he would not surrender the old until the new lease was executed. But the terms of the habendum itself lead in my mind to the conclusion that the lease was not executed until some time after the 25th *March*, 1783, and this is made more manifest by the manner in which the rents are reserved. There are two rents reserved, one of 60*l.* and the other of 15*l.* and both are payable quarterly; but the first quarter of the latter rent is not to be paid until the 24th *June*, 1783. Surely this is decisive to shew that it was the intention of the parties that the term was to commence on the 25th *March*, 1783. That being the effect of the contents of the instrument itself, let us see what the memorandum near the

attestation imports. It is signed by all the lessors, and is as follows, "We whose names are undermentioned do agree to the within writings that the said *John Walker*, for the space of thirty-five years, is to pay 60*l.* per year neat money; *and to prevent any dispute which might arise, we have indorsed the same from Lady-day,* 1783." The meaning of these latter words is certainly not very precise, but giving any sense we can to them, it seems to me it must necessarily be taken that they were not written until after *Lady-day*, 1783. If they refer to any other indorsement on the lease they must be understood as referring to the words "dated the 10th of *May*, 1783," and that would be evidence that the lease was not in fact executed until the 10th *May*, 1783. Upon the whole I am of opinion that the plaintiff is entitled to recover, and that we are bound to consider the term as not expiring until *Lady-day*, 1818.

Bayley, J.—I am of the same opinion. The defendant was assignee of *Joseph Dale*, who occupied the premises until a short time before *Lady-day*, 1817. At *Lady-day* in that year the defendant entered into possession and occupied until *Lady-day*, 1818, and therefore for that period of time he is liable to somebody for the rent, whether he occupied under the lease or not. He is liable either to the plaintiff who claims under *Walker*, or to those who claim under the *Goodings*. He is liable to the plaintiff, as *Walker's* representative, if the term did not expire until *Lady-day*, 1818, but to *Goodings'* representative if it expired at *Lady-day*, 1817. It is contended on the part of the defendant that the lease expired at *Lady-day*, 1817; and the foundation of that argument is, that the date in the first part of the lease is *Lady-day*, 1783, and that the habendum is "to hold from *Lady-day* now last past," and consequently as the lease begins to run at *Lady-day*, 1782, it would expire at *Lady-day*, 1817. If the deed was really executed on the 25th *March*, 1783, certainly the *Lady-day* "now last past," would be *Lady-day*, 1782. But it may happen

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that though a lease is dated on one day, yet it may not have been executed until a subsequent day, and whenever this is the case, if it can be established that it was not executed on the day it bears date, but at some subsequent day, the terms of reference as to time, such as "now" or "then" or "henceforth," will apply, not to the day expressed as the date, but to the time of the actual delivery of the deed, and from that time the lease will take effect. This is laid down in *Clayton's* case (*a*). In that case indentures of demise were engrossed, bearing date the 26th *May*, the 25th of *Elizabeth*, to have and to hold for three years *from henceforth*, and the said indentures were delivered at four o'clock of the afternoon the 20th day of *June* in the year aforesaid, and the question was when this lease by computation should have its beginning, whether from the day of the date, or from the delivery; and it was resolved by the whole court "that *from henceforth* shall be accounted from the day of the delivery of the indentures, and not by any computation of date, for, *from henceforth* is as much as to say "from the making, or from the time of the delivery of the indentures," or a confectione præsentium, for the confection or making of the lease does begin by the delivery, and these words "from *henceforth*, or any other words of the indenture are not of an effect or force until delivery, quia traditio loqui facit chartam." Apply the doctrine of that case to this. There it is said that from "henceforth" means, not from the 26th *May*, but from the 20th *June*; and for the same reason, the words "now last past" will mean the day on which this lease was executed, and not the 25th *March*, when it bears date. I agree that there must be some evidence to satisfy the Court that the lease was not executed on the day it bears date; but in this case there was abundant evidence to that effect. Now if the construction contended for on the part of the defendant be correct, it would be rather singular, considering the manner in which the rent is reserved, that the term should commence in computation

(*a*) 5 Rep. 1.

of time from the antecedent year. Why should it commence at that period? If the lessee had actually occupied during that time, he must have paid his rent; but if the term of this lease is to be computed from *Lady-day*, 1782, the effect would be to make him liable to the payment of one year's rent over again; for at *Midsummer*, 1783, he would have to pay five quarters' rent instead of one, which is certainly not according to the ordinary course of dealing between landlord and tenant. But there is upon this lease a memorandum signed by the only persons who had an adverse interest in this question, which declares that this lease was to commence from *Lady-day*, 1783, for a period of thirty-five years from that date. Now if this had been a verbal declaration instead of a written one it would have had the same effect, for if at any time after the lease had been executed the lessors were asked, "was this lease executed on the 25th *March*, 1783, or after?" and they had said it was executed afterwards, that would be evidence as against them that it was to take effect from the *Lady-day* preceding the delivery. If their verbal declaration in that respect would be evidence against them, à fortiori the same declaration in writing must have the like effect. For these reasons I am of opinion that we are justified in assuming that the lease was not executed until after the 25th *March*, 1783, and that the words "now last past" must have reference to that date absolutely.

HOLROYD, J.—I think there was reasonable evidence to go to the jury that the lease was executed after the day it purports to bear date. If that be so, then *Clayton's* case is an express authority to shew that the deed is to take effect from the day of the delivery and not from the day of the date. I apprehend it to be perfectly clear that a party may shew that the deed was delivered on a different day from that on which it bears date. For this *Oshey* v. *Sir Patrick Hicks* (*a*) is a direct authority. That was an action of cove-

(*a*) Cro. Jac. 263.

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nant upon an indenture dated on the 9th *October*, 38 *Eliz.* to have the moiety of a quantity of corn which was *then* laden, or afterwards should be laden, in a certain ship on a voyage from *Dantzick* to *Leghorn*, and the defendant pleaded that the deed was sealed and delivered on the 28th *October*, and traversed the delivery of it on the 9th, and judgment was given for the defendant, the Court saying, that the word *time* referred to the time of the essence of the deed, by the delivery, and not to the date; and *Fleming*, J. said, "if one covenants that *J. S.* shall have all his trees *now* standing, it refers to the trees standing at the time of the delivery; and if any be felled after the date, and before the delivery, he hath not any remedy for them." Now that being the rule of law, the only question is whether there was evidence to go to the jury in this case, to satisfy them that the lease was not delivered until after the date. I am satisfied that there is sufficient evidence that it was not executed on the day it bears date, but that it must have been executed at a subsequent time, and therefore the plaintiff's interest was not determined during the time the defendant was in the occupation of the premises.

LITTLEDALE, J.—I think, under the circumstances of this case, we must assume this lease to have been executed after the date 25th *March*, 1783; for although, primâ facie, the words "now last past" would refer to the 25th *March*, 1782, yet if there is sufficient evidence from which it may be presumed that the deed was not actually delivered until after the day it bears date, then the words "now last past," will relate to the 25th *March* preceding the time of delivering the deed, and according to the authorities cited, the deed will take effect from the day of the delivery and not from the day of the date.

Rule discharged.

SKYRING, administratrix of G. SKYRING, deceased, *v.* GREENWOOD and COX.

Friday, June 10.

Where the paymaster of a regiment gave credit in a running account with an officer on a foreign station, for sums of money as increased pay and allowances, to which, from a misconstruction of a general order, he supposed the officer was entitled, and after having been apprized by the Board of Ordnance that such sums would not be allowed, suffered the officer to remain in ignorance of this fact for four years:—Held, in an action by the officer's personal representative, for pay remaining due, that the paymaster was concluded by the account in which he had erroneously given credit for the increased allowances, and was not at liberty to set off the latter against the demand.

THIS was an action for money had and received by the defendants to the use of the intestate in his lifetime, and to the use of the plaintiff as administratrix, since his decease. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the adjourned sittings in *Middlesex* after last *Michaelmas* term, the cause was tried on admissions, in which were stated the following facts:—The plaintiff was administratrix of the late *George Skyring*, who had been a major in the royal artillery, of which corps the defendants were paymasters, and held their appointment by commission. In 1806 the pay of the whole army was fixed by regulations, which were made known to the different branches of the service by general orders issuing from the respective proper departments. The general order for the ordnance or artillery, issued from head-quarters at *Woolwich* on 27th *August*, 1806, was as follows:—"His Majesty having been most graciously pleased to express his approval of the classes of officers, non-commissioned officers, and gunners of the royal regiment of artillery, partaking of the advantages in point of pay, granted to the infantry, as far as the several ranks of one service correspond with those of the other, to commence from the 1st *July*, 1806; the following rate of increase to the pay is announced in orders, and attaches to the invalid battalions, marching battalions, horse brigade, foreign and the King's *German* artillery, viz. (amongst other ranks) captain and second captain, 1s. 1*d.* per diem; two shillings per diem more to captains having the brevet rank of major or any superior rank; adjutants and quarter-masters, who hold two commissions, are not entitled to the increase of pay. First gunners are entitled to the same increase of pay as gunners. The above increase of pay and allowances to officers are granted under the same restrictions as the

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allowance of one shilling a day added to the pay of subalterns in 1797, and consequently the difference between the former and increased rates is not in any case to be received by an officer holding more than one military commission or appointment, nor to give claim to any higher half-pay on reduction." The regulations of 1797 had also been published in like manner by a general order of the 28th *July* in the same year, of which the following is a copy:—"His Majesty is graciously pleased to order that from the 25th of last month an allowance of one shilling per diem shall be made to each captain, first lieutenant, adjutant, and quartermaster, belonging to the marching and invalid battalions of the royal regiment of infantry artillery, not holding another commission." The intestate *G. Skyring* was a captain in the royal regiment of artillery, having also the brevet rank of major before the 1st *January*, 1817, and from thence to the 5th *November*, 1820, when he obtained the regimental rank of major, and during the same time had the appointment of brigade-major of the garrison of *Gibraltar*. There had been a running account between Major *Skyring* and the defendants from the 1st *January*, 1817, to the 31st *December*, 1820, in which credit was allowed to him for his pay to the 5th *November*, 1820, including therein 1*s.* 1*d.* per day increase of captain's pay granted by the order of 27th *August*, 1806, from the 1st *January* to the 31st *December*, 1817, amounting to 19*l.* 15*s.* 5*d.*, and two shillings a day increase, granted by the same order to captains having the brevet rank of major, from the 1st *January*, 1817, to the 5th *November*, 1820, amounting to 140*l.* 10*s.*, those two sums making together 160*l.* 5*s.* 5*d.*; and a statement of that account was delivered to Major *Skyring* early in 1821, and there appeared due to him on the balance thereof 116*l.* 9*s.* 7*d.* Major *Skyring* was allowed credit for these sums of 1*s.* 1*d.* and 2*s.* a day in the account, in conformity with the usage which prevailed in paying other officers of the regiment, having the same rank and appointment during the same period, and which usage had prevailed from the date

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of the general order of the 27th *August*, 1806, and according to which all such payments have been allowed by the Board of Ordnance in the account of the defendants with them to the 31st *December*, 1816. In the month of *December*, 1816, the Board of Ordnance intimated to the defendants that they would not allow any payments of the 1*s.* 1*d.* and 2*s.* a day to officers having the rank and appointment which Major *Skyring* had, and that the same were not warranted by the general order of 27th *August*, 1806. This intimation was, however, not communicated to Major *Skyring* in any other manner than by the defendants ceasing to allow him credit for the 1*s.* 1*d.* a day after the end of 1817, and writing to him the following letter, dated 8th *May*, 1821. "Sir,—We beg to acquaint you that a deduction has been made by the Honorable Surveyor General from your regimental pay, and which has been confirmed by the Board, of 391*l.* 14*s.* 5*d.* being the increase of 1*s.* 1*d.* and 2*s.* brevet per diem granted by the regulations of 1816, but to which it appears you were not entitled, having held the appointment of brigade-major at *Gibraltar* from the 1st of *July*, 1806, to the 5th *November*, 1820, in addition to your commission as an officer of artillery. We have, therefore, to request you will make a remittance for the above sum. Memorandum.—Increased pay 1*s.* 1*d.* 1st *July*, 1806, to 31st *December*, 1816, and brevet pay 2*s.* per day, 4th *June*, 1813, to 5th *November*, 1820". The sum of 391*l.* 14*s.* 5*d.* mentioned in this letter included the 160*l.* 5*s.* 5*d.* before mentioned. The Board of Ordnance refused to allow the defendants any payments of the 1*s.* 1*d.* and 2*s.* a day subsequent to the 31st *December*, 1816. The running account between Major *Skyring* and the defendants was continued to the 6th *December*, 1822, the day of his death, during which time his pay and various sums on other accounts, received and paid by the defendants by his order, were placed to his account, but no statement of the account was delivered to him by the defendants. The defendants, after the death of Major *Skyring*, delivered to the plaintiff

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a statement of their account with him to the day of his death, in which they brought forward, and amongst other items allowed him credit for, the 116*l.* 9*s.* 7*d.* balance due on the former statement of the account, and charged him with the aforesaid sum of 391*l.* 14*s.* 5*d.*, which included the 160*l.* 5*s.* 5*d.* as aforesaid; but the charge of 391*l.* 14*s.* 5*d.* has been since reduced by the defendants to the said 160*l.* 5*s.* 5*d.*, which latter sum the defendants claimed a right to retain, on the ground of their having, by mistake, allowed to Major *Skyring* 1*s.* 1*d.* a day from the 1st *January* to the 31st *December*, 1817, and 2*s.* per day from the 1st *January*, 1817, to the 5th *November*, 1820, making the amount of 160*l.* 5*s.* 5*d.* as ordnance pay beyond the amount which the ordnance regulations entitled him to receive. Under these circumstances it was contended, that as the defendants had never in fact received the increased pay and allowances for which they had given Major *Skyring* credit, they were not bound by the account rendered in 1821. But the Lord Chief Justice was of opinion that the account then rendered was an admission by the defendants that they had received the allowances in question on account of Major *Skyring*, and that they were not entitled afterwards to withdraw from that admission, on the ground that in 1816 they had received a communication from the Board of Ordnance that the additional allowances would not be sanctioned, which communication they had never intimated to the major. The jury therefore, under his lordship's directions, found their verdict for the plaintiff.

Gurney, in *Hilary* term, obtained a rule nisi for a new trial, against which

Scarlett and *Bingham* now shewed cause. There are two grounds on which the defence set up by the defendants cannot be supported; first, admitting that the credit given by them to Major *Skyring*, in account, was allowed under a mistake, still, as it took place with full knowledge on their

part of all the circumstances of the case, it is too late to open the account again; and second, from the peculiar situation of the defendants, as paymasters of the regiment, by commission from the crown, they are estopped from saying that the sums in question were allowed in account under a mistake. As to the first point, there can be no doubt that if the defendants had actually paid the money to Major *Skyring* with knowledge of all the circumstances, but under a mistaken view of his rights, and though the money was not really due to him, still, upon decided authorities, they could not afterwards have recovered it back: *Lowry* v. *Bourdieu* (*a*), *Bilbie* v. *Lumley* (*b*), and *Brisbane* v. *Dacres* (*c*). But the actual payment of the money makes no difference in the principle upon which this doctrine is founded, for the allowance of it in account is in effect the same thing, the reasons for so holding in the one case being equally applicable in the other. The case of *Jeffs* v. *Wood* (*d*) is an authority for saying that the set-off of one sum of money against another, in balancing an account, is equivalent to payment. Now, did the defendants give Major *Skyring* credit with full knowledge of all the circumstances? In the first place, the general order of 1806 refers to the order of 1797, and there is in the former a distinct notification that the increased rates of pay and allowance to officers are granted under the same restrictions as the allowance of one shilling a day, added to the pay of subalterns by the latter; and consequently, the difference between the former and increased rates could not in any case be received by an officer holding more than one military commission or appointment. The defendants, therefore, must have known that the appointment of brigade-major, which was merely given by the commanding officer of the garrison, and revocable at pleasure, could not entitle Major *Skyring* to the additional allowances. But, in the second place, the defendants could not have made these allowances in account

(*a*) Doug. 467.
(*b*) 2 East, 469.
(*c*) 5 Taunt. 143.
(*d*) 2 P. Wms. 128.

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under any mistake, because at the close of 1816 the Board of Ordnance communicated to them that these payments would not be allowed, not being conformable to the general order of 1806. This communication was never imparted to Major *Skyring* until 1821, and in the interim, notwithstanding the notice from the Board, they go on giving him credit in account for the increased allowances. Surely, under such circumstances, and after so many years had elapsed, it would be most unreasonable to allow the defendants to open the accounts again and excuse themselves on the ground of mistake. Upon this point the observations of *Gibbs*, J. in *Brisbane* v. *Dacres*, are most pertinent and conclusive. Secondly, however, the peculiar situation of the defendants, as paymasters of the corps, estops them from saying that they gave the major credit in account for the increased allowances under a mistake. As paymasters of the regiment, they have an opportunity of exercising their judgment and ascertaining what each officer is entitled to receive. If an officer on a foreign station exceeds his pay, they are not bound to honour his drafts; but if they have funds in their hands, or conceiving that the officer is entitled to two shillings a day increased allowance, make payments to him on that footing, the law will not allow them afterwards to recover the money back on the ground that they have made a mistake. It is their duty to know their own rights and liabilities. They were not agents for the Board of Ordnance. Government issues to the paymasters sufficient money to pay the troops conformably to the general orders notified to the army; and if the defendants, with knowledge (and they must be presumed to have such knowledge) of what each officer in the corps is entitled to receive, think proper to give an officer credit for more than he is entitled to receive, they are precluded from afterwards recovering back the money, on the ground that they had not in fact received it from government. The defendants must have known that Major *Skyring*, as major of brigade, by virtue of the general order of 1806, which

referred to that of 1797, was not entitled to an increased allowance in respect of that appointment, and therefore, having done that which is equivalent to payment, it is to be considered as a voluntary payment in their own wrong, and they are thereby concluded.

Gurney and *Tindal*, contrà. If the argument on the other side could prevail, it might have the effect of ruining a paymaster, who, by a mistake in his accounts, may have credited the officers of his regiment with more than they are entitled to receive. Whatever construction may be put upon the general orders set out in the admissions, that is a matter wholly out of the present case. The duty of a paymaster is only to pay, to the officers of the regiment, what he receives from government, and beyond that he cannot be liable. Here the defendants are appointed paymasters to this regiment by the Board of Ordnance, and all they have to do is, to hand over to the officers the money which is issued for pay and allowances. For the convenience of officers on foreign stations, accounts are opened by the paymaster; but is it to be said that because the paymaster has made a mistake in his accounts, and given credit to an officer for money, which it is admitted on all hands he was not entitled to receive, he is precluded for ever from setting the mistake right? It is said on the other side that as a party who has actually paid money, which he had not received, but paid it with a full knowledge of all the circumstances, cannot maintain an action to recover it back, so a party, who has given credit in account for money he has not received, shall not be at liberty at any time to rectify his mistake. Now no authority has been cited for so extensive a proposition as that. It would be carrying the doctrine of *Brisbane* v. *Dacres*, and other cases of that class, farther than general grounds of reasoning will warrant. These defendants are not interested in disputing the proposition that if a party, with full knowledge of all the circumstances, actually pays over money which he has not received,

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he cannot afterwards set himself right; but the objection here is, that the money has never been paid to Major *Skyring*, nor has it been received by the defendants. This is an action for money had and received. Now, how can it be said that the defendants are liable to such an action, when the money has never come to their hands? [*Bayley*, J. The foundation of the action for money had and received is, where the party has either actually received money to the use of another, or acknowledges that he has done so. Now here the defendants must be considered as having rendered themselves liable to such an action, by telling Major *Skyring* in their account credit, that he had a right to apply these additional allowances to his own use, and regulate his expenditure accordingly.] It must not be forgotten that the account between the defendants and Major *Skyring* has been, from the beginning to the end, a running account, and it is rather a novel proposition, that in a running account, where a party has made a mistake, it shall never be in his power to rectify it. Surely, whilst the matter is in account, it may be said to be in fieri, and until the account is finally settled, the mistake may be set right. Suppose there had been a mistake in calculating the number of days, months, or years, in bringing out the gross sums, fancied to be due to a particular officer of the regiment, can there be any doubt that the paymaster would have a right to correct his mistake in settling the ultimate balance? If not, then upon the same principle these defendants have a right to rectify the mistake into which they have fallen by erroneously giving credit to Major *Skyring* for increased allowances, to which he was clearly not entitled. This cannot be disputed as a sound rule of reason and justice, unless indeed the Court adopts the second proposition, relied upon on the other side, that as paymasters the defendants are estopped from correcting an account which they have once rendered. Now there is no just reason upon which that argument can stand. Why is a paymaster, any more than other persons keeping a running account with another, to be precluded

from correcting a mistake in mere calculation? An ordinary agent has this right, but à multo fortiori it belongs to the paymaster of a regiment, whose bare duty is to pay what he receives, without any other obligation than being the hand to hand over the government money.

ABBOTT, C. J.—It is not necessary to decide that a person who has, by a mistake of fact or of law, given credit to another in account for money which he afterwards finds he himself cannot receive, is estopped, by the account so rendered, from saying, in the character of paymaster of a regiment, that the money was not due to the party; because there is a particular fact in this case, on which I formed my judgment at nisi prius, which renders it immaterial to consider that question. The defendants, being the paymasters, received, in the course of their duty, sums of money generally from government for the corps, without rendering any account of the appropriation of them until after they had been actually appropriated. That was the situation and duty of the defendants. Certain orders having been issued by the Board of Ordnance for increasing the pay of the officers in the artillery corps, the defendants placed to the credit of Major *Skyring*, down to *November*, 1820, the increase of allowances which it was then supposed he was entitled to have. In 1821 he finds an account delivered, in which credit is given to him for all these sums, making a balance in his favour of 116*l*. 9*s*. 7*d*. Now, if Major *Skyring* had drawn a bill for that balance upon the defendants, and they had paid it, or, remaining in *England*, he had received the amount, I take it to be quite clear that the defendants could not have recovered it back in an action at law, on the ground that, under the general order of 1806, it was not due to the major. If that be so, I am of opinion that neither could they set it off as against the demand of Major *Skyring* or his personal representatives, arising out of monies which they had subsequently received on his account. The defendants afterwards received and paid

further sums on Major *Skyring's* account, from time to time, and in the result all claims will be paid off, if the defendants can be allowed to bring back the sum of 160*l*. 5*s*. 5*d*. and charge it against the money received subsequently to *May*, 1821. Now the particular fact belonging to this case, and upon which I relied at the trial, and which induces me still to be of the same opinion, is, that in the year 1816 the defendants were informed that the Board of Ordnance would not allow the additional pay which the defendants had given Major *Skyring* credit for, down to *November*, 1820. Although informed of this in 1816, they made no communication of it to Major *Skyring*, but left him wholly in ignorance of it until *May*, 1821, having in the mean time given him credit for the increased allowances until the latter end of 1820. It appears to me that it was their duty to communicate to Major *Skyring* the information which they had themselves received, but they forebore to do so; and that is a very different matter from making a mistake in an account, and discovering afterwards that such a mistake had been made. By abstaining from giving any intimation to Major *Skyring* of the information which they had received, they suffered him to go on for four years upon the supposition that he was entitled to these increased allowances. It is of great importance to every man, and not the less so to officers in the army, that they should not be led to suppose that their income is greater than it really is. Every prudent man accommodates his style of living to what he supposes to be his income. If therefore, by the negligence of the defendants, they have allowed Major *Skyring* to suppose that he was entitled to those increased allowances, I think justice requires that they should not be permitted now to deduct these sums from the subsequent account between them and the deceased. It is suggested that this decision may have the effect of ruining the defendants, but I hope that will not be the result. Whatever hardship it may bring upon them, it must be attributed to their own breach of duty in forbearing to communicate to Major *Skyring* the

notice given by the Board of Ordnance in 1816. Had they acted otherwise, the case might have been different. The only other hope I venture to express is, that government will take their case into consideration.

BAYLEY, J.—This may be a hard case on the defendants, but they have brought it entirely upon themselves. This is an action brought to recover money which the defendants had received for the use of the plaintiff. If they are entitled to insist upon a set-off, they have an answer to the action, but if they are not, then the plaintiff has a right to retain the verdict. The foundation of their set-off is this: From 1816 down to the year 1820, the defendants had been giving credit to Major *Skyring* for various sums of money as if he were entitled to them, whereas in reality he was not entitled to them during that period. The answer to this is, that during the whole of that time the defendants well knew they were not warranted in giving him credit for any of those sums, and that they were guilty of a neglect of duty in not making a communication to Major *Skyring* of the absolute instructions which they had received from the Board of Ordnance. Now if they had told him promptly that he was not entitled to the increased allowances, he would have regulated his conduct accordingly, and might have limited the extent of his expenditure. Suppose the balance of the account delivered in 1821 had been paid to Major *Skyring*, and there had been no subsequent pay received by the defendants for his use, and they had brought an action to recover this money back again, on the ground that they had improperly given him credit for it, I am of opinion they could not have been entitled to recover, because it would be an answer in a court of justice for Major *Skyring* to say, "I never desired you to advance me the money, but I merely drew for it, because you told me you had received it for my use." On the same principle, I think, that as they had voluntarily placed the money to the credit of the intestate, and thereby induced him to suppose it was his own, they are not now at liberty to retain it as a set-off against

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the demand made by his personal representatives for money which has subsequently accrued due. It may be a hard case upon the defendants, but as the blame attaches originally to their own conduct, and as it might work injustice to Major *Skyring*, or his representatives, if we were to hold that the defendants might now reimburse themselves out of money in their hands, I think the defendants have no right to complain.

HOLROYD, J.—I am of the same opinion. This is an action for money had and received by the defendants to the plaintiff's use since the year 1816, and the plaintiff has a right to recover unless the defendants have a debt against the intestate which they can set off. Now in 1821, an account is delivered to Major *Skyring* giving him credit for money due to him, minus sums which the defendants had paid to his order, leaving a balance in his favour of 116*l.* 9*s.* 7*d.*, but it is insisted that as in that account credit was given to him for allowances to which he was not entitled, the defendants have a right to open the account again and set off those allowances against the balance subsequently accruing in their hands. For the reasons already given by the Court I think they ought not to be allowed so to do. Suppose the balance admitted to be due in 1821 had been paid, and money belonging to the major had come subsequently into the hands of the defendants, I think they could not have recovered back the balance which they had so paid after they had admitted it was so due to him of his own right; but although they had not in fact paid it, still their own acknowledgment that it was due, concludes them from saying that it was a mistake, particularly after the communication which they had received from the Board of Ordnance in 1816, and which they wrongfully kept from the deceased. I therefore think that the defendants had no debt which they could set off, and consequently that the verdict in this case was perfectly right (*a*).

Rule discharged.

(*a*) *Littledale*, J. was absent.

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Tuesday, June 14.

A colonel in a regiment on full pay was appointed civil superintendant of a colony, and, "to command such of His Majesty's subjects as are now armed, or may hereafter arm, for the defence of the settlers." After acting both as military commander and civil superintendant some years, his regiment was disbanded, and he was reduced to half pay; but he was still recognised in both capacities by the authorities at home and in the colony:—Held, that his appointment to command all persons armed for the defence of the colony, gave him a right to command all the King's troops there, and, that he did not lose that right by the disbandment of his regiment, and his reduction to half-pay.

TRESPASS for an assault and false imprisonment. Pleas, first, not guilty. Second, in justification, that defendant was a commissioned officer, that is to say, a lieutenant-colonel in the King's army, and as such officer was employed in the King's service, and had the military command, conduct, care, government and direction of certain of the King's land forces, then employed in the King's service, in parts beyond the seas, to wit, at *Honduras*, in *North America*; that plaintiff was a commissioned officer, that is to say, a major in the King's army, and as such officer was employed in the King's service, and serving among the King's land forces at *Honduras*, and was under the military orders and command and the government and direction of defendant as such officer as aforesaid at *Honduras*; that defendant being such officer, and so employed, and having such command, &c. as aforesaid, and plaintiff being such officer, and so employed, and serving and being under such orders, &c. as aforesaid, plaintiff, a little before the time when, &c. to wit, on the same day and year, did, contrary to his duty as such officer, endeavour to excite and stir up a mutiny among the King's forces at *Honduras*, in breach of good order and military discipline, whereupon defendant put plaintiff under arrest, &c. Third, the same, only charging that plaintiff did without any lawful authority assume to himself the command of the land forces at *Honduras*. Fourth, the same, only charging that plaintiff did refuse to obey a certain military order of defendant as such officer as aforesaid, which order extended to plaintiff in respect of his duty as such officer as aforesaid, and which order it was the duty of plaintiff to have obeyed. Three other pleas similar, only describing plaintiff as His Majesty's commandant of the garrison at *Honduras*. Replication, de injuriâ suâ, with a new assignment that defendant on other days and on other occasions,

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and for a much longer time than was lawful or necessary for the causes in the pleas mentioned, to wit, on 1st *June*, 1820, and from thence continually for a long time, to wit, for nine months thence following, wrongfully imprisoned plaintiff without any lawful authority, or any reasonable or probable cause whatsoever. To this new assignment there were several special pleas, but as the case did not turn upon them, it is not necessary to set them out. At the trial before *Abbott*, C. J., at the *London* adjourned sittings after last *Trinity* term, the facts detailed in evidence were these. The defendant was a major in the 7th *West India* Regiment quartered at *Honduras*, and was, in the month of *July*, 1814, appointed by the Duke of *Manchester*, then governor of *Jamaica*, His Majesty's superintendant of the British settlement at *Honduras*, by which appointment he was directed to take under his protection the interest of His Majesty's subjects resident at that place. About the same period he received from General *Fuller*, then commander of the forces in the island of *Jamaica* and its dependencies, of which *Honduras* was one, the following written appointment:—"I do hereby constitute and appoint you, the said *George Arthur*, to command such of His Majesty's subjects as are now armed, or may hereafter arm, for the defence of the settlers of the bay of *Honduras;* you are, therefore, as commandant, to take upon you the care and charge accordingly." Having received these appointments, the defendant took upon himself these offices, and from that time acted as military commandant at *Honduras*, and as such issued all orders down to the period of his quitting the settlement in 1822. In 1817 the defendant had been appointed Lieutenant-colonel of the *York* Chasseurs, which regiment was disbanded in 1819, and with the fact of which disbandment he was acquainted on the 24th of *August* in that year; but he continued nevertheless to act as military commandant of *Honduras*. In *March*, 1820, the plaintiff, who was then lieutenant-colonel of the 2d *West India* Regiment, on full pay, was quartered at *Honduras*, and believing that the de-

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fendant, by the disbandment of the *York* Chasseurs, had lost his military command, and that the right of command had thereby devolved upon himself as the officer next in rank, he refused to obey an order issued by the defendant for a general meeting of the officers at *Honduras*, at ten o'clock on the 23d of *May*, 1820, and he himself issued a counter order for a similar meeting at his own quarters at the same day and hour; and for this alleged misconduct he was put under arrest by the defendant. Sir *Henry Torrens*, Sir *Herbert Taylor*, and several other military men, gave it as their opinion, that where an officer at the same time holds a commission in a regiment and a military command in a settlement, his military command is not affected by the disbandment of his regiment, but continues unaltered, although his regimental rank is gone. This evidence was objected to on the part of the plaintiff, but was admitted by the Lord Chief Justice. It was also in evidence that the commander of the forces at *Jamaica* had authority to appoint the military commandant at *Honduras*, and that the defendant was recognised, both before and after the disbandment of his regiment, as well in the settlement as by the authorities at home, as the military commandant at *Honduras*. After having put the plaintiff under arrest, the defendant forwarded to General *Walker*, the then commander of the forces at *Jamaica*, dispatches upon the subject, which were forwarded by General *Walker* to the commander-in-chief for his directions, and in the result the plaintiff was dismissed from His Majesty's service. The plaintiff was continued under arrest for some time after the defendant knew that he had been dismissed from the service. The Lord Chief Justice was of opinion, upon this evidence, that the fact that the defendant was the commanding officer at *Honduras* at the time when he put the plaintiff under arrest, was sufficiently established, and, consequently, that the pleas of justification were made out; but he left it to the jury to say, whether the defendant had not detained the plaintiff under arrest for a longer period than he had any right to do, after he knew that

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he had been dismissed from the service. The jury found their verdict for the defendant upon the pleas of justification, and for the plaintiff upon the new assignment, with 100*l*. damages.

Brougham, in *Michaelmas* term last, obtained a rule nisi for a new trial upon two grounds: first, that the opinions of the military officers with respect to the usage in the army, had been improperly received in evidence; and second, that the defendant having lost his commission by the disbandment of his regiment, had thereby necessarily lost his military command also, and consequently could not be the commanding officer at *Honduras* at the time when he put the plaintiff under arrest.

Copley, A.G., *Gurney*, and *Parke*, shewed cause. The only question in this case is, whether the defendant was or was not the superior officer at *Honduras*, at the time when he issued that order, for the disobedience of which he found it necessary to place the plaintiff under arrest. That the order so issued was lawful in itself, and that it was disobeyed, is admitted; the argument is that the plaintiff had no authority to issue it. Now the first clause in the Mutiny Act declares, "that any person who shall disobey any lawful command of his superior officer, or shall desert his Majesty's service, whether such offence shall be committed within this realm, or in any other of his Majesty's dominions, or in foreign parts upon land or upon the sea, shall suffer death, or such other punishment as by a court-martial shall be awarded:" and the Articles of War declare, "that whenever any officer or soldier shall commit a crime deserving a punishment, he shall by his commanding officer be put in arrest if an officer, or if a non-commissioned officer or soldier, be imprisoned until he shall be either tried by a court-martial, or shall be lawfully discharged by a proper authority." Then do the facts of this case bring it within these provisions? In other words, what is the effect and

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operation of these provisions? By the Mutiny Act the King is enabled to maintain a standing army in time of peace, but he regulates and controls that army by virtue of his prerogative, and it is that which vests in him the sole command of all the forces in the kingdom. The appointment of all the subordinate officers is in him, and upon him their relative rank depends. There is, consequently, no written law either for the definition or regulation of military authority; the whole rests exclusively upon usage. Then what was the usage, prevailing in the army and recognised by the crown, applicable to the present case? That was a question of evidence, and accordingly evidence was produced clearly establishing that the usage in the army is to appoint those officers to military commands who already held regimental commissions, and that when they were so appointed, the loss of the latter by means of the disbandment of a regiment did not deprive them of the former. Then, was that evidence admissible according to the general rules and principles of law? *Barwis* v. *Keppel* (*a*) is an express authority to shew that it was. That was an action by a serjeant in the second regiment of Guards, stationed in *Germany*, against his commanding officer, a major, commanding the second battalion of the same regiment, for reducing him to the ranks, as a punishment for his disobedience of orders. There was a special case reserved for the opinion of the court, which stated, "that by the Articles of War, non-commissioned officers may be discharged as private soldiers, either by order of the colonel of the regiment, or by the sentence of a regimental court-martial; that it is generally and universally understood in the army, that the whole power of the colonel devolves, in his absence, on the commanding officer for the time being, and that in fact such commanding officer ranks as colonel, and always acts as such: and that by the constant custom and practice of the army, the commanding officer for the time being hath always made serjeants, and broke or reduced them in the same

(*a*) 2 Wils. 314.

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manner as the colonel himself might have done if actually present." There, the usage of the army being stated in the case as a fact, must have been considered by all parties as proper and legitimate evidence; here, the usage of the army was deposed to by witnesses the most capable of knowing it correctly, and was properly admitted in evidence. Then upon that evidence it clearly followed, that the defendant, being a commissioned officer, and being appointed superintendant of *Honduras*, became ipso facto, necessarily, and by virtue of his office as superintendant, the commander in chief, or supreme military commander in the colony; and even if that were not so, still his appointment by General *Fuller*, who it was proved had authority to make that appointment, undoubtedly conferred upon him the supreme command; and he was recognised, both in the colony, and by the authorities at home, as the commandant, after his regiment had been disbanded. If any doubt existed as to the power of General *Fuller* to make the appointment, it is removed by the Articles of War, which state, "that colonels, majors, captains, and other inferior officers serving by commission from the governors, lieutenants, or deputy governors, or presidents of the council for the time being of our said provinces and colonies in *North America*, shall on all detachments, courts-martial, or other duty wherein they may be employed in conjunction with our regular forces, have rank next after all officers of the like rank serving by commissions." Upon the whole, therefore, it seems clear, first, that the defendant was, by the usage of the army, the superior officer when he issued the order which the plaintiff thought proper to disobey; and, second, that evidence of that usage was properly admissible to prove that fact. Upon both grounds, consequently, this rule must be discharged.

Brougham, *J. Evans*, and *Cameron*, contrà. This application must fail, and the verdict must stand unaltered, if it has been shewn by proper evidence, that the defendant was a military officer, holding a supreme military command

at the time when he placed the plaintiff under arrest; because, in that case, the pleas of justification have been made out. Now, first, this has not been shewn at all. When a man insists upon his right to exercise a military command, he must prove two things; first, that he is, himself, a person capable of holding such command, and second, that he has received it from a person capable of conferring it. That the crown, by virtue of its prerogative, has power to appoint any man, even a mere civil person, to a military command, cannot, nor need be disputed; but it cannot delegate that power: and even if it could, there was no evidence in this case that it did delegate, either to the Duke of *Manchester*, or to General *Fuller*, the power of granting commissions. There are many circumstances strongly tending to shew that the crown, without the authority of parliament, cannot delegate to any subject the power of granting a commission in the army. It is by the statute 13 and 14 *Car.* 2. c. 3. s. 2., that the lords lieutenants of counties are empowered to grant commissions in the militia. It is by special authority, conferred by statute, that the *East India* Company are enabled to grant commissions to cadets to hold military appointments, although they have, in other respects, the complete government and territorial authority in *India*. It is by the statute 1 and 2 *W.* & *M.* st. 2. c. 2. s. 2., that the lords commissioners of the admiralty are invested with the same power to grant commissions, as had been formerly possessed, also under the authority of the statute law, by the Lord High Admiral. These are all pregnant authorities for saying that, without the authority of parliament, no subject can, even by the delegation of the crown, legally and constitutionally take upon himself to grant a commission; and if so, the defendant was invested with no military command, by virtue of the appointment of General *Fuller*; and then the recognition of him by the authorities at home, or even by the crown itself, as the commandant of the forces at *Honduras* has no weight, because such a recognition could not better an authority naught in

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its inception. For the same reason the plea justifying the defendant's act as commandant of the forces at *Honduras* must fail. There is no such rank known in the army as that of commandant; it is a mere civil title applicable to the senior officer in the place. It is a mere appointment, and if it gave the defendant the power and rank which he assumed upon the strength of it, it would follow that a non-commissioned officer, holding such an appointment, might command a commissioned officer, which would be at once to subvert all military rank, and to exceed the prerogative of the crown itself. The Mutiny Act provides that commissioned officers only shall sit upon courts-martial, and the Articles of War provide (section 18.) "that all commissions granted by the King, or by any of his generals from him, shall be entered in the books of the Secretary at War, or Commissary General, otherwise they will not be allowed of;" but there was no evidence to shew, either that the defendant's commission was granted by a general, or that it was entered in the books of the Secretary at War or Commissary General: it was, therefore, in fact no commission at all; as a mere civil appointment it might be good, but as a military command it was void. But, if General *Fuller* had the power to grant the defendant a commission, it is clear that he had no such intention, for his appointment is not couched in the language invariably used by the crown when conferring a military command. His language is, "to command such of his Majesty's subjects as are now armed, or may hereafter arm for the defence of the settlers at *Honduras;*" the language of the crown is, "to command officers and soldiers, armies and forces:" and the latter words are found both in the Mutiny Act and in the Articles of War, as denoting a regular military force, which the former words by no means denote. But again, if General *Fuller* was both qualified and minded to grant, and the defendant was at one time qualified to hold, a regular commission, still, the moment his regiment was disbanded and himself reduced to half-pay, he lost that qualification, and had no longer

authority either to command the troops, or to put the plaintiff under arrest. A half-pay officer is, in the proper sense of the word, no officer at all; he is no longer amenable to martial law himself, and has no authority to command those that are: for it would be a monstrous and alarming proposition indeed to say that a man could govern others by a code so absolute and arbitrary, who was himself not subject to any of its provisions. When a military man is reduced to half-pay, he ipso facto loses his military character, *Bowler* v. *Owen* (*a*), where the question being whether the defendant, who was an out-pensioner of *Chelsea* hospital, was within the protection of that clause of the Mutiny Act which provides that no soldier or officer in the King's service shall be arrested for any debt under 20*l.*, the Court held that he was not, *because* he was not subject to military discipline, but to the control of the commissioners only. Second, the evidence of usage, without which the defendant made out no case, was not properly receivable. The question at issue was, whether the defendant was or was not, *by law*, the commanding officer at *Honduras*, and upon such a question mere military usage could not be admissible in evidence, one way or the other. *Barwis* v. *Keppel* (*b*) has been cited contrà, but that case is distinguishable from the present in three important particulars. First, the usage there was admitted by consent of both parties as an undisputed fact in the case, therefore its admissibility as legal evidence was not the subject of argument at the bar, or of decision by the bench. Secondly, that was an action on the case for reducing an officer to the ranks, and usage, therefore, might be receivable to shew that the act complained of was done legally, and consequently without malice; there the plaintiff was only deprived of his pay, here he has been deprived of his liberty. Thirdly, the plaintiff and defendant there were properly liable to martial law and not to the civil law, and it was upon that principle that the case was decided: here the defendant was not himself liable to

(*a*) Barnes, 432. (*b*) 2 Wils. 314.

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martial law, and therefore had no authority over the plaintiff who was. That distinction is forcibly pointed out by Lord *Loughborough* in his judgment in the case of *Grant* v. *Gould* (*a*). "Where martial law prevails," said that learned Judge, "the authority under which it is exercised claims a jurisdiction over all military persons, in all circumstances. Even their debts are subject to an inquiry by a military authority; every species of offence, committed by any person who appertains to the army, is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs." Now that *Barwis* v. *Keppel* (*b*) was decided upon that distinction, is clear from the language of the Court there, for they said, "By the act of parliament to punish mutiny and desertion, the King's power to make Articles of War is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or Articles of War; and therefore you cannot argue upon either of them, for they are both to be laid out of this case." The dangerous results likely to flow from a too extended admission of evidence of usage, are well pointed out in the case of *Sheppard* v. *Gosnold* (*c*). The question there was, whether certain goods that had been saved from wreck were liable to tonnage and poundage, and the Lord Chief Justice, after shewing that the language of the statute did not apply to the case, thus proceeded: "The second objection is, that the King's officers, by usage, have had in several Kings' times, the duties of tonnage and poundage from wrecks. We desired to see ancient precedents of that usage, but could see but one in the time of King *James*, and some in the time of the last King, which are so new that they are not considerable. Where the penning of a statute is dubious, long usage is a just medium to expound it by; for jus et norma loquendi is governed by usage, and the meaning of things spoken or written must be, as it hath constantly been received to be, by common acceptation. But if usage

(*a*) 2 H. Bl. 69. (*b*) 2 Wils. 314. (*c*) Vaughan, 159.

hath been against the obvious meaning of an act of parliament, by the vulgar and common acceptation of the words, then it is rather an oppression of those concerned, than an exposition of the act, especially as the usage may be circumstanced. As, for instance, the customers seize a man's goods under pretence of a duty against law, and thereby deprive him of the use of his goods, until he regains them by law, which must be by engaging in a suit with the King; rather than do so, he is content to pay what is demanded for the King. By this usage all the goods in the land may be charged with the duties of tonnage and poundage; for when the concern is not great, most men (if put to it) will rather pay a little wrongfully, than free themselves from it over-chargeably." This is just reasoning, and it applies to the present case; for if men will submit to an ancient though illegal tax, rather than incur the temporary inconveniences of a law-suit, à fortiori will they yield to a pretended usage, though set up for the first time, rather than incur the sudden and irreparable loss arising from being deprived, at a moment's notice, of the rank and maintenance which they hold in the army.

ABBOTT, C. J.—I am of opinion that this rule must be discharged. It has been admitted that the defendant at the time when he received his appointments from the Duke of *Manchester* and General *Fuller*, whatever the nature and effect of those appointments might be, was a person capable of holding a military command; and indeed that could not reasonably be denied, because he was then a commissioned officer in the King's army, and on full pay. Then, as he was a person capable of holding a military command, the question is, was any military command given him? He was first appointed, by the Duke of *Manchester*, superintendant at *Honduras*. That was a civil appointment. He was then, almost at the same moment, appointed by General *Fuller*, who was then the commanding officer on that station, "to command such of His Majesty's subjects as are

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now armed, or may hereafter arm, for the defence of the settlers of *Honduras*," and "as commandant, to take upon himself the care and charge accordingly." It has been said, and I believe truly, that the language there used is not conformable to the language used by the crown when granting military commissions properly so called; but it nevertheless appears to me clearly to import that the defendant was to take the command of *all* the forces at *Honduras*, soldiers as well as others, and consequently that that appointment vested in him the supreme military command, connected with the supreme civil authority previously conferred upon him by the Duke of *Manchester*. But it has been further said, that even admitting that to be so, still when the regiment in which he was commissioned was disbanded, and he was reduced to half-pay, he ipso facto lost, not only his regimental rank, but his capability of exercising those military powers which he might properly have exercised before. Now, the command and regulation of the army belonging exclusively to the king, is a matter for his discretion and authority, except so far as that discretion and authority are regulated and controlled by the law of the land; therefore in construing and defining that discretion and authority, we must look to the Mutiny Act, and to the Articles of War, which emanate from the King under the authority of the Mutiny Act, and to those only. The Mutiny Act contains nothing upon this subject, and the Articles of War do not, in my opinion, throw any light upon it. Neither of them, certainly, contains any thing to shew, that a person originally well appointed to a military command, which, as I have already stated, I conceive the defendant to have been, loses that command by the mere circumstance of the regiment in which he held a commission being disbanded and himself reduced to half-pay. There is, then, no authority for saying that any such consequence ensues, and on the contrary, it seems to me, that a command so received must be considered as enuring, until it is withdrawn by the act of the King himself. The defendant's situation as commandant

at *Honduras* had no connection with his situation as colonel of a regiment, for his regiment was not stationed at *Honduras*. If the disbanding of his regiment put an end to his authority as commandant, it must have had that operation instanter; the effects of which would be highly mischievous; for not only would it be uncertain for some time who was to succeed to the command, but every act done by him, if he continued the actual command, during the interval of the disbandment taking place, and the official notification of that fact, would be void. I do not rely, to any great extent, upon the opinions expressed by Sir *Henry Torrens* and others at the trial; though, coming from persons so well informed upon the subject, they certainly claimed respect; but the fact, distinctly proved, that subsequent to the knowledge of the disbanding of his regiment, the defendant continued to be recognised by the authorities both at home and abroad, as commandant of *Honduras*, seems to me most important, for that recognition in the result became the recognition of the King himself, who, upon a reference of the question to himself, supported the authority exercised by the defendant, and reprobated its resistance by the plaintiff, by dismissing the latter from the service. Then, as there is no rule of law, and no written authority to be found, which forbids our giving effect to the plain and unequivocal intention of the crown, (in whom the sole command of the army is vested,) upon the subject, we are, in my opinion, bound to say, that the arrest of the plaintiff by the defendant was a lawful act, and consequently that the pleas of justification have been made out, and this rule must be discharged.

BAYLEY, J.—I am of the same opinion. It seems to me that we should not be warranted in holding that the authority conferred upon the defendant had terminated, but that it continued at the time when he ordered the plaintiff into arrest. If the Mutiny Act or the Articles of War had limited the powers of the Duke of *Manchester* and General

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Fuller, and had pointed out to them certain persons upon whom alone they should confer the command, any appointment made by either of those individuals in opposition to those restrictions would have been void. But, after looking carefully through the Mutiny Act and the Articles of War with this view, I am satisfied that they are both perfectly silent upon that subject. Then, as they are silent, we are not only entitled but bound to look at the usage, for by so doing we may be enabled to form our judgment of the case more correctly. The usage shewed that a mere civil person, that is a person having no military character, cannot be appointed to a military command; and the reason I take to be, that such a person could not be expected to possess the knowledge and talents which are indispensable qualifications for such an office. But it also shewed that a military officer, whether on half or full-pay, may be so appointed, which seems to me equally reasonable, because a half-pay officer may be fairly expected to have the same knowledge and talents, and to be equally well qualified for the office, with a full-pay officer. The objection then taken is, that a half-pay officer is not amenable to a court-martial. Undoubtedly it has been so decided, but I apprehend the decision applies to *unemployed* half-pay officers only. Such persons would not satisfy the description of the Mutiny Act, which, in enumerating the parties liable to courts-martial, speaks of persons "commissioned or in pay as officers." But *employed* half-pay officers would satisfy that description, because, though they are not "commissioned," they are "in pay, as officers." Whether the defendant received pay in respect of his situation as commandant, does not appear, though it can scarcely be doubted that he did; and the words "in pay" are, in my judgment, equivalent to the word "employed." It is said he could not be employed, because he was not amenable to a court-martial; I think the converse of the proposition would be more correct, that he must have been amenable to a court-martial, because he was employed. An unemployed officer

may receive no pay quà officer, but I should presume that every officer who is actually employed does receive pay quà officer. But I cannot find any thing in the Mutiny Act requiring that a person appointed to a command must be a person liable to courts-martial; and even if the defendant received no pay, still I can see no reason why, having once duly received his appointment, he should not continue to hold it. At the time of his appointment he was an officer on full-pay, and he was stationed at *Honduras* not as a commissioned officer, not as an officer of regimental rank, for his regiment was absent elsewhere, but as a staff officer merely; and as a staff officer he would clearly be entitled to pay. The disbanding of his regiment, and the consequent reduction of his rank and pay as connected with the regiment, would not deprive him of military knowledge and talent for his appointment as commandant; and it must have been in consequence of that military knowledge and talent that he received that appointment. Then why should the disbanding of his regiment have the effect of depriving him of his rank as commandant? It would, in my opinion, be mischievous to hold, that a circumstance so accidental in itself, and so perfectly unconnected with the station where he was, should have the operation both of releasing him from all obligation to perform his military service, and of preventing him from all power to exercise his military authority, in that place to which he had been legally appointed. I am satisfied that that can only be effected by his being regularly and properly superseded by the crown. The crown, in the exercise of its prerogative, appoints particular individuals to hold the chief military command in particular districts, and to those individuals it of necessity delegates the power of appointing the subordinate officers within their respective districts. If a subordinate officer thus appointed were, at however critical a juncture, necessarily to lose his command the moment he received intelligence that his regiment, quartered at a distance, had been disbanded, the consequences would be most injurious. The

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officer commanding the district may, upon receipt of such intelligence, supersede him, should he think it for the interest of the service so to do, and appoint another in his room; but to hold that the authority were, ipso facto, at an end, would be highly mischievous. The result of the inquiry at head-quarters shews what sense the crown entertained of this transaction, and that sense ought to prevail, and to decide the question now, unless it militates against that law which regulates the rights of the army. For these reasons I am of opinion that the defendant was still invested with the right of command when he issued the order which the plaintiff disobeyed; that in disobeying that order the plaintiff was guilty of a breach of duty for which he was liable to arrest; and consequently that he cannot recover in the present action, except upon the new assignment. The present rule, therefore, ought clearly to be discharged.

HOLROYD, J. concurred.

LITTLEDALE, J. having been of counsel in the case, while at the bar, declined giving any opinion.

Rule discharged.

Tuesday, June 14.

In re TAYLOR, Gent. one &c.

A person who holds a situation, and receives a salary from government, as surveyor of assessed taxes, is not sui juris to enter into a contract for service as an articled clerk to an attorney: and, where a person so situated, was articled to an attorney, and nominally served him for five years, retaining his situation under government all the time, and then commenced practising as an attorney, the Court ordered him to be struck off the roll.

ALDERSON had obtained a rule calling upon Mr. *Taylor*, an attorney of this Court, to shew cause why he should not be struck off the roll, upon affidavits stating that *Taylor* was articled to *Richardson*, an attorney at *Knaresborough*, in *November*, 1814, for five years; that he was assigned by *Richardson* to *Powell*, another attorney in the same place, in *May*, 1819, for the residue of his time; that during the

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whole of those five years, and for some time before, *Taylor* held a situation under government, as surveyor of assessed taxes of *Claro* and *Rippon*, at a very considerable salary; that the duties of that situation required his full daily employment, and that for the purpose of transacting them he rented premises in *Knaresborough*; that he never acted either in the office of *Richardson* or *Powell* as an articled clerk, or performed any services there in the business or profession of an attorney; and that he was discharged from his situation under government in *September*, 1820, in consequence of his then commencing to practise as an attorney. The affidavits in answer were these:—first, of *Taylor*, which stated that his office of surveyor of taxes did not occupy more than one fourth of his time, and that during the remainder of his time he was studying his profession; that he was always ready and willing to perform any service both for *Richardson* and *Powell*, and that he did perform some service for each, in writing documents and taking journies: then of *Richardson* and *Powell*, which stated, respectively, that *Taylor* had performed some service for them, and was always ready and willing to perform any service required of him; and, lastly, of two attornies, named *Earnshaw* and *Collins*, which stated that they believed *Taylor* to be a fit and competent person to practise as an attorney.

Scarlett and *J. Williams* shewed cause. The question is, whether Mr. *Taylor* has duly served his clerkship, so as to satisfy the requisites of the statutes 2 *Geo.* 2. c. 23. s. 2. and 22 *Geo.* 2. c. 46. s. 8. The former directs that no person shall be admitted to act as an attorney, "unless such person shall have been bound, by contract in writing, to serve as a clerk, for and during the space of five years, to an attorney duly and legally sworn and admitted according to that act; and that such person, for and during the said term of five years, shall have continued in such service:" and the latter, that "every person who shall become bound by contract in writing to serve any attorney, shall, during the

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whole time and term of service to be specified in such contract, continue and be actually employed by such attorney, or his agent, in the proper business, practice, or employment of an attorney." Now, in point of duration, the service in this case was clearly sufficient to satisfy these statutes, for Mr. *Taylor* was bound to Mr. *Richardson* for five years, and continued under that contract, first, with that gentleman, and afterwards with Mr. *Powell*, for more than that period. The nature of the service was sufficient also; for it is sworn that Mr. *Taylor* actually performed some services as an attorney's clerk for both his masters, and was always ready and willing to perform any service which they either did or might require of him: therefore, his holding the situation of surveyor of taxes was no violation of his duty as an attorney's clerk, and ought not to vitiate his service as such. His competency to practise as an attorney is also sworn to, and, consequently, he has satisfied all the requisites of these acts of parliament, and ought not to be prevented from exercising the profession, for which he has thus qualified himself, and his removal from which must produce his ruin (*a*).

E. Alderson, contrà. The affidavits upon which the rule was obtained have not been answered either by facts or arguments, and the nature of the defendant's situation and employment, as disclosed by the former, is quite inconsistent with the idea of service for the term of five years in the business of an attorney, as required by law. His office of surveyor of taxes, and the duties attendant upon it, were perfectly incompatible with the character and the duties of an articled clerk. His time, his talents, and his exertions, were all the property of government, whose servant he was, and whose wages he was receiving, before he was articled to Mr. *Richardson*; and any service that he did or could render to that gentleman, or to any other person, as an attorney's

(*a*) Vide *Fletcher's* case, 2 Bl. Rep. 734; *Blunt's* case, id. 764; *Carter's* case, id. 957.

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clerk, was a fraud upon his original masters and employers. Besides, he was not sui juris, or capable of entering into any contract of service, at the time when he was so articled; a service performed under such circumstances will not satisfy the 3 *W.* & *M.* c. 11, so as to confer a settlement; *Rex* v. *Beaulieu* (*a*); and upon the same principle it will not satisfy these statutes so as to qualify the party to practise as an attorney.

Abbott, C. J.—This is a pure question of law, arising upon the construction of the two acts of parliament which have been cited; and as such, whatever our personal feelings on the subject may be, we must treat it. The object of both those acts is one and the same, namely, to insure to all persons, admitted to act as attornies, a competent share of skill and ability in the profession; and in order to effect that object, they both expressly require, from all such persons, a previous service of five years with an attorney, in his business, under a written contract for a service of five years. There are certain circumstances under which the contract may be dissolved; as the death, insolvency, or retirement from business, of the master, and an interruption of the service, so occasioned, may be filled up and requited by a new service of adequate length under a new contract. But in the present case much more is required, for we are asked to allow this gentleman to fill up intervals of days, nay, even of hours, in various parts of every year of his clerkship, during which he rendered no service to his master, and was actually bound, by the duties of an office under government, to devote all his time and all his services to the public. That it is impossible to allow, without violating both the letter and the spirit of the acts of parliament, and therefore, however much we may regret it, we are bound to make this rule absolute. It is our duty to abide by the plain and general rules of law, and not to suffer them to be strained or defeated by the special circumstances of any particular

(*a*) 3 M. & S. 229.

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case. But we should be doing so if we were to permit this gentleman to practise, for it is impossible to say that he has rendered such a service as the law plainly and peremptorily requires, during any period of the five years for which he contracted to serve.

BAYLEY, J.—I entirely concur in opinion with my Lord Chief Justice, who seems to me to have laid down the only correct mode of construction of the acts of parliament, and the only proper rule of conduct for the Court. Every contracting party must be sui juris at the time when he enters into the contract, and if he is not so, he cannot derive any right or benefit from the contract. This gentleman was not sui juris when he entered into the contract of service, because he then held an office under government, and owed a duty to the public, perfectly inconsistent with his situation and his duties as the articled clerk of an attorney. It seems to me, therefore, that the contract was void ab initio, and if so, he could not possibly perform any valid service under it.

The other judges concurred.

Rule absolute.

Thursday, June 16.

The KING v. M'KAY.

Quo warranto information, for the office of bailiff of a borough, describing it as "an office of great trust and pre-eminence within the borough, touching the rule and government of the borough, and the election and return of burgesses to serve in parliament for the borough." Pleas, averring that defendant had been appointed to the office; "without this, that the said office is an office touching the rule and government of the borough." General replications, taking issue on all the allegations of the pleas except the traverse, and special replications setting forth several different customs for the appointment of the bailiff. Demurrer and joinder:—Held, first, that for "an office of great trust and pre-eminence within the borough, touching the election and return of burgesses to serve in parliament," Quo warranto would lie: second, that defendant not having traversed that part of the description, had admitted it: and third, that the *general* replications being good, the demurrer to *all* the replications was bad, and entitled the crown to judgment. *Semble*, that the *special* replications were bad.

QUO warranto. The information stated that the borough of *Stockbridge*, in the county of *Southampton*, is an ancient borough; that two burgesses now are, and for ten years and upwards have been, elected and sent, and of right ought to

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be elected and sent, to serve as burgesses of and for the borough in the commons in the parliament of this kingdom; that for and during all that time, there hath been, and still of right ought to be, within the borough, as appertaining thereto, one bailiff of the borough; that the office of bailiff of the borough now is, and for and during all the time last aforesaid hath been, *an office of great trust and pre-eminence within the borough, touching the rule and government of the borough, and the election and return of burgesses to serve for the commons in parliament for the borough*; and that defendant did, on &c., at &c., use and exercise, and from thence continually hath used and exercised, without any legal warrant, royal grant, or right whatsoever, the office of bailiff of the borough, &c. Pleas, first, that *J. F. Barham*, Esq., was on &c., seised in fee of the borough and manor of *Stockbridge*, and was lord of the same borough and manor, and of the court-leet holden in and for the same; that the said *J. F. B.*, and those whose estate he hath, from time immemorial have of right had and held, and still of right ought to have and hold, on *Wednesday* next after the feast of *Easter* in every year, a court-leet in and for the borough and manor, of all the inhabitants within the borough and manor, before the steward of the borough and manor, or his deputy; that the lord of the borough and manor for the time being, during all the time last aforesaid has had, and of right ought to have had, and the said *J. F. B.* still of right ought to have, a bailiff of the borough and manor, for the receiving of the rents, reliefs, amerciaments, and perquisites of courts of the lord of the borough and manor, and to do all other things belonging to the office of bailiff; and that the said bailiff, during all the time last aforesaid hath been, and of right ought to have been, and still of right ought to be, appointed yearly and every year, at the court-leet, by the steward of the Court, or his deputy, on behalf of the lord. Averment, that, on &c. a court-leet was held, and defendant was appointed bailiff by the deputy steward, and thereupon took upon himself the office of bailiff of the

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borough for the year next ensuing, "without this, that the said office of bailiff in the said information above mentioned, is *an office touching the rule and government of the said borough*, and without this that defendant the said office, liberties and franchises, in the information mentioned, did usurp upon our lord the King," &c. There were four other pleas, each varying in the description of the mode of defendant's appointment, but each concluding with precisely the same traverse as the first. To these pleas, there were, first, sixteen general replications, taking issue upon all the facts pleaded, and especially upon the fact of the lord being entitled to have a bailiff for the receiving of the rents, &c.; and, second, thirty special replications, setting forth several different customs for the election or appointment of the bailiff. No one of the replications took notice of the traverse in the pleas. The defendant then demurred to all the replications, and assigned for causes of demurrer, "that it does not appear, nor is it shewn in or by any of the said pleas above pleaded in reply, that the said office of bailiff of the said borough and manor is *a public office touching or concerning the government of the said borough*, or an office for the use and exercise of which our said lord the King will or ought to sue, harass, or vex the said defendant; but, on the contrary thereof, it appears by the several pleas pleaded by the said defendant, and by the several pleas pleaded in reply, that the said office is a private office of the lord for the receiving of the rents, &c., of the said lord of the borough and manor, and not an office touching the rule and government of the said borough." Joinder in demurrer.

Merewether, in support of the demurrer. The real, and only question in this case is, whether this is, in the words of Lord *Kenyon* in *Rex* v. *Mein* (*a*), an office of magnitude sufficient for the Court to take notice of by way of information in the nature of quo warranto. On the part of the defendant it is confidently submitted that it is not. The

(*a*) 3 T. R. 596.

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case just cited will be relied on contrà, but the language of Lord *Kenyon*, when describing the nature of the office there, does not apply to the office here. The defendant there was port-reeve of a borough and manor, and, as such, returning officer of the borough; and Lord *Kenyon* said, "a port-reeve, ex vi termini, implies a public peace officer; and he is here clothed with that very important constitutional office of returning officer: that is perfectly sufficient to bring him within the scope of this information." So it was held, in *Rex* v. *Bingham* (*a*), that a quo warranto information would lie against the bailiff of a borough and manor, who, being a prescriptive officer and member of the court-leet, had power to summon and select the jury; *because*, such a discretionary power is a material and important function in the administration of justice. But here, the office is not one which concerns the government of the borough, nor the administration of public justice; it is in fact a private office, and as such does not come within the scope of a quo warranto information; *Rex* v. *Boyles* (*b*).

Carter, contrà. This is an office of a public and continuing nature, and falling within the general principles acted upon in the descriptions given in the cases cited on the other side, and which are, indeed, authorities in favour of this proceeding. But even if it were not an office for which a quo warranto information would lie, still the defendant cannot now take that objection, for he has estopped himself from so doing by having demurred jointly to all the replications. The defendant has put upon the record no less than five pleas; he must, therefore, have obtained the leave of the Court to plead double; and having done so, and filed one demurrer to all the replications, he has admitted that the information will lie, and cannot now withdraw that admission. [*Bayley*, J. It is not made clearly to appear that the office described in the pleas, and to which the defendant avers that he has been duly elected, is the same office de-

(*a*) 2 East, 308. (*b*) 2 Ld. Raym. 1559.

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scribed in the information.] It certainly is not, and in that point of view the pleas are no answer to the information.

Bayley, J.(a)—It was decided in the case of the borough of *Horsham, H. 30 Geo. 3.* (b), that an information in the nature of a quo warranto would lie against a person claiming to have a right of voting by virtue of a burgage tenement: I have therefore no doubt that the present office, qualified as it is by the plea, is nevertheless an office for which an information in the nature of a quo warranto will well lie. The information states that the borough of *Stockbridge* is an ancient borough, that it sends two members to parliament, that there has been, and ought to be, as appertaining to the borough, one bailiff, and that the office of bailiff is an office of great trust and pre-eminence within the borough, touching the rule and government of the borough, and touching the election and return of members of parliament for the borough. The defendant pleads, specially, several facts shewing his title by way of inducement, and concludes by traversing, first, in a formal manner, his usurpation of the office, and secondly, as he intends, in a substantial manner, the relator's description of the office. By this traverse the defendant has limited the operation of his plea, and has rendered it an answer to that part only of the information which he has specified in his traverse. The matters of inducement to the traverse, which make up the rest of the plea, furnish no answer to the other parts of the information; in the present state of the record they stand unanswered: they could be answered only by a distinct plea. What then is the effect of the defendant's traverse? Merely, to take out of the information, all that the traverse includes, namely, that the office is one "touching the rule and government of the borough." But taking those words out of the information, what is the office then? The information still describes it, and the plea admits it to be, "an office of trust and pre-eminence, touching the election and

(a) *Abbott*, C. J. was absent.

(b) 3 T. R. 299. *in notis*.

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return of members of parliament." Then is that an office for which a quo warranto will lie? I am of opinion that it is. It is not necessary in informations of this nature to set out the particular duties of the office, it is sufficient to set out so much as makes it appear that the office is a franchise granted by the crown. Now all the offices in a borough must originally have been created by a charter from the crown, so that the only question is whether this is a liberty or franchise. It seems to me, upon the authorities cited, that it is. In *Rex* v. *Mein*, Lord *Kenyon* said that a portreeve was ex vi termini a public peace officer, though he held that the information would lie in that case upon the ground of his being returning officer of the borough; and *Rex* v. *Horsham* goes still further, and is a much stronger case than the present. The present information does not state in terms that the bailiff is returning officer of the borough, but I think it states as much in effect, for it seems to me impossible to conceive that any one can, with relation to a borough, hold an office touching the return of members of parliament, except the returning officer. Upon these grounds it appears to me that this is an office for which quo warranto will lie, that the defendant's traverse is no answer to the information, and, consequently, that the crown is entitled to judgment.

Holroyd, J.—I am of the same opinion. At all events the crown is entitled to judgment upon the general replications. The defendant's plea attempts too much. It sets up two grounds of defence. First, that he was duly elected or appointed, and second, that he was not a public officer. If the traverse had extended over the whole of the description in the information, either of those grounds of defence would have been good, and the plea, consequently, would have been bad, for duplicity. But the plea admits that the office is one touching the election and return of members of parliament, and being so, it is a public office, for which a quo warranto will lie.

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LITTLEDALE, J.—I am inclined to think that the special replications are bad, because, instead of confessing and avoiding the plea, or denying it, which if the plea is good upon the face of it they ought to do, they set up a different mode of election; a sort of pleading which might be protracted to an endless length. The defendant, however, has demurred to all the replications, general and special, which he clearly cannot do; the demurrer, therefore, cannot be supported, and upon the whole of the pleadings, as they appear upon this record, I agree that our judgment must be for the crown.

Judgment for the crown.

Thursday, June 16.

DARTNALL v. HOWARD and GIBBS.

A count in assumpsit against an attorney for negligence stating, "that in consideration that plaintiff would retain defendant in investing money in the purchase of an annuity, defendant undertook to perform his duty in the premises; that plaintiff did retain defendant for the purpose aforesaid; yet defendant did not perform his duty in the premises, but invested the money in security of no value, by reason of which premises plaintiff lost the money:"—Held, bad, on motion in arrest of judgment.

ASSUMPSIT. The first count stated, that whereas heretofore, to wit, on &c., at &c., in consideration that plaintiff, at the request of defendants, would retain and employ defendants to invest and lay out 1400*l.* in the purchase of an annuity for plaintiff, defendants undertook and promised plaintiff to perform and fulfil their duty in the premises; that plaintiff, confiding in the promise and undertaking of defendants, did retain and employ defendants for the purpose aforesaid;* and that although defendants did purchase a certain annuity of 216*l.* of one *H. M. Gould* for plaintiff, payable to plaintiff his executors, &c., during the life of *Gould*, yet defendants did not perform or fulfil their duty in the premises, but neglected so to do, and on the contrary thereof laid out the said 1400*l.* in the purchase of an annuity of 216*l.* on the mere personal security of *Gould* and of one *E. Birmingham*, commonly called Lord *Atherley*, for the payment of the said annuity, the said *Gould* and Lord *Atherley*, or either of them, not being possessed of any pro-

perty whatever available for the securing the payment of such annuity, they being at the time of granting the said annuity in insolvent circumstances, of all which premises defendants then and there had notice. Second count, like the first to the asterisk, and although defendants did procure a certain annuity to be granted by *Gould* to plaintiff, and a certain indenture, to be made between *Gould* of the first part, Lord *Atherley* of the second part, and plaintiff of the third part, for granting and securing the payment of the said annuity to plaintiff, in which indenture it was amongst other things mentioned, that, for further securing the payment of the said annuity, *Gould* and Lord *Atherley* had executed certain warrants for confessing judgments or causing judgments to be entered up against them in actions of debt at the suit of plaintiff, his executors, &c.: yet defendants did not perform or fulfil their duty in the premises, but neglected so to do, and on the contrary thereof laid out 1400*l.* on the said pretended security so by *Gould* and Lord *Atherley* to plaintiff given, *Gould* being at the time of granting such annuity in prison for debt, and *Gould* and Lord *Atherley* respectively being at the time of granting such annuity in insolvent circumstances, of all which premises defendants then and there had notice. Third count, that in consideration that plaintiff would retain and employ defendants in laying out and investing 1400*l.* in the purchase of an annuity for plaintiff, defendants undertook &c. to perform and fulfil their duty in the premises, that plaintiff confiding &c. did retain and employ defendants for the purpose aforesaid; yet defendants did not perform or fulfil their duty in the premises, but laid out the same upon security wholly insufficient and of no value whatsoever; by reason of which premises plaintiff hath wholly lost the said 1400*l.*, and the advantage, profit and emolument which might and would have accrued to him if the same had been laid out and invested in the purchase of an annuity upon good and valid security, and has been and is thereby damnified, &c. The money counts; plea, non-assumpsit, and issue thereon. At the trial before

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Abbott, C. J. at the adjourned *Middlesex* sittings after last *Michaelmas* term, a verdict was found for the plaintiff.

Copley, A. G., in last *Hilary* term, obtained a rule to shew cause why the judgment should not be arrested, on the ground that there was no averment in the declaration, either that the defendants were to receive any remuneration for their services, or that they were retained or employed by the plaintiff as attornies; and that, consequently, there was no consideration set out upon which to raise a promise, nor any duty alleged upon which to found a breach.

Scarlett and *Abraham*, on a former day in this term, shewed cause. If this action merely charged the defendants with not investing the plaintiff's money at all, pursuant to their undertaking and duty so to do, the objection urged in arrest of judgment might be available; for to support such an action it is necessary to set out a consideration. But this is an action for improperly investing money, and may be supported by a mere undertaking, without any consideration. The well known distinction between acts of nonfeazance and acts of misfeazance, as laid down in *Coggs* v. *Bernard* (a), and recognized in *Elsee* v. *Gatward* (b), applies to this case. In the former of those it was decided, that any man that undertakes to carry goods, though without any consideration or reward, is liable to an action, if through his neglect the goods are lost or damaged; for the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management if he enters upon the trust. In the latter it was held, that if a carpenter undertakes to build or repair a house, and he does it unskilfully, an action will lie against him for the misfeazance, though no consideration is alleged. This is an action for a misfeazance, and the defendants come clearly within the distinction; for having undertaken to invest the plaintiff's money, they were bound by implication of law to invest it properly, and failing to do so, they are

(a) 2 Ld. Raym. 909. (b) 5 T. R. 143.

liable to an action, without any consideration being alleged. The same distinction was again recognized, and the same principle admitted, in a more recent case of *Campbell* v. *Curran* (*a*). That was an action against the defendant for not effecting an insurance upon certain sugars belonging to the plaintiff, which were lost, and the plaintiff thereby damnified. The plaintiff obtained a verdict, a bill of exceptions was tendered, and the case was finally argued before the privy council. The objection was, that the declaration did not allege that it was the duty of the defendant to effect an insurance upon the sugars, or that he had any consideration for so doing; and, the action having been brought for not insuring, that objection was held to be good, because for a nonfeazance an action will not lie without alleging a duty and a consideration for it: but it was admitted, that if the defendant had insured the goods, but so ineffectually that the policy was not available, an action might have been maintained for that misfeazance without any such allegation. So here, the defendants, having invested the money, the common law imposed upon them an obligation to do it prudently and beneficially, and having neglected that duty, they are guilty of a misfeazance for which they are liable in this form of action, though no consideration is alleged.

Copley, A. G., *Gurney* and *Chitty*, contrà. This is an action of assumpsit. There is no consideration stated, there is no duty alleged, there is no gross negligence shewn; this action, therefore, cannot be maintained, although there may perhaps be such a misfeazance as might have supported an action in case. It is not alleged in any one of the counts of the declaration, nor is there any thing from which it can reasonably be inferred, that the defendants were employed by the plaintiff as attornies, and if they were not employed in that character they owed no duty to the plaintiff, for the breach of which they can be made responsible. It was held in *Bourne* v. *Diggles* (*b*), that in an action against an

(*a*) Not reported. (*b*) 2 Chitt. R. 311.

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attorney for not looking sufficiently into a title, it is sufficient to state that he was retained as an attorney, without stating the consideration; which shews that one or other of those statements is absolutely necessary, whereas neither of them is to be found here: and *Clarke* v. *Gray* (*a*) shews that every declaration in assumpsit must state so much of the contract as contains the entire consideration for the act, and the entire act which is to be done in virtue of such consideration; which this declaration certainly does not state. The averment of notice to the defendants is also insufficient, for in order to render them liable in this action it must be shewn that they knew of the insufficiency of the security before they invested the money, and the allegation here, that they *then and there* had notice of all the premises, imputes to them that knowledge only at the time when the security turned out to be insufficient.

ABBOTT, C. J.—There seems to me to be a difficulty in the way of the plaintiff's maintaining this action, which has not yet been noticed. It is this:—Neither the first or second count alleges that the plaintiff has received any damage by means of the money being entrusted to and improperly invested by the defendants; and the third count only alleges that the defendants laid out the money upon bad security, and that by means of the premises the money became lost to the plaintiff. Now that might have happened, even if the defendants had used reasonable care and prudence in the investment of the money, without making them liable in this form of action. It seems to me, therefore, that there is no sufficient allegation of the plaintiff's being damnified by the misconduct of the defendants in any part of the declaration; and if so, it cannot certainly be supported. We will, however, look a little further into the case, and deliver our judgment hereafter.

On this day, accordingly, the judgment of the Court was delivered by

(*a*) 6 East, 564

ABBOTT, C. J.—For the reason stated by myself on a former occasion, it is perfectly clear that the first two counts of this declaration are bad, and we are now all of opinion that the third count is bad also. It does not allege that the defendants are attornies, or that they were employed as such by the plaintiff; it merely avers that they undertook to do their duty in the premises, that they did not do their duty, and that by those means the plaintiff has been damnified. We think it is impossible for us to say that persons so employed to invest money for another, are under an absolute legal obligation to take care that they do not invest that money in insufficient securities. Their duty under such circumstances is to act honestly, and with reasonable care and skill, and no more; and it is perfectly consistent with their so acting, that the security they take may turn out to be insufficient, for that may happen to any man in investing his own money, though he uses all the caution and care in his power. Upon this principle we are of opinion, that the third count of this declaration is equally bad with the two former, and therefore that the rule for arresting the judgment must be made absolute.

Rule absolute.

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Saturday, June 18th.

The title of the electors, corporators de facto, cannot be put in issue in a quo warranto information against the elected.

QUO warranto information against the defendant for usurping the office of mayor of the town and borough of *Monmouth*. Pleas, first, that defendant was elected and sworn mayor pursuant to the provisions of a charter granted to the town and borough by 3 *Edw.* 6th, setting out the charter, and averring its acceptance, and that it still governed the town and borough. Second and third pleas, substantially the same, and fourth plea, that defendant was elected pursuant to the provisions of a non-existing bye law, setting it out, which was made to regulate the election of mayor.

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Thirty-one general replications taking issue upon all the facts alleged in the pleas; and special replications, first, that at the said meeting of the said burgesses of the said town and borough, held on &c., for the chusing of a mayor of the said town and borough, as in the said first plea above mentioned, two several candidates were duly nominated and proposed for the office of mayor of the said town and borough, to wit, one *R. B.*, then and there being a burgess of the said town and borough, and then and there being a fit and proper person to be such mayor, and the said defendant; and that afterwards, and after such nominating and proposing of the said *R. B.* and of the said defendant, to wit, on &c. at &c. a poll of the votes for the said respective candidates was then and there demanded, and was then and there granted by *T. G. P.*, acting as mayor of the said town and borough, and presiding at the said meeting. And the said coroner further saith, that divers of the burgesses of the said town and borough, to wit, &c. (setting out fifty persons by name) having a right to vote in the said election of mayor of the said town and borough, attended and were present at the said last mentioned meeting, as such burgesses as aforesaid, and then and there tendered and offered their votes respectively for the said *R. B.*, to be such mayor of the said town and borough, to the said *T. G. P.*, then and there acting as mayor of the said town and borough, and the presiding officer of such meeting. And the said coroner further saith, that the said (fifty persons before named) so offering and tendering their votes for the said *R. B.* were rejected by the said *T. G. P.*, and were not reckoned as voters, and that divers, to wit, &c. (setting out thirty-eight other persons by name) of the said supposed burgesses, in the said first plea above stated to have been met and assembled together, and to have chosen the said defendant to be mayor as aforesaid, had been theretofore, to wit, *A. B.* &c. on the 17th day of *July*, 1820, *C. D.* &c. on the 20th day of *July*, 1820, *E. F.* &c. on the 4th day of *December*, 1820, *G. H.* &c. on the 18th day of *June*, 1821, and *I. K.* &c. on the 10th day of

February, 1823, respectively, illegally chosen to be burgesses at certain pretended corporate meetings of the said burgesses, on those respective days, and had, under and by colour of the said illegal elections, and with no other right or title, been severally admitted as burgesses of the said town and borough, and that the said (thirty-eight persons before named) then and there not being legal burgesses of the said town and borough, and then and there having no legal right to vote as burgesses at the said election of mayor, tendered their votes for the said defendant, and were objected to by *J. P.*, a burgess, as persons having been improperly and illegally admitted burgesses of the said town and borough, and as having no legal right to vote as last aforesaid, but were, notwithstanding such objection, severally and respectively admitted by the said *T. G. P.*, then presiding as mayor, to give their votes for and on behalf of the said defendant, and did give their votes for and on behalf of the said defendant, and the same were then and there received and reckoned as votes for the said defendant. And the said coroner further saith that the major part of the burgesses so met and assembled and present at the said last mentioned meeting, who had a right to vote, and ought to have been admitted and received as legal voters at such election respectively, voted and tendered their votes for the said *R. B.* to be such mayor as last aforesaid; and the said *R. B.* had then and there a majority of legal votes in his favour, to be such mayor as last aforesaid, and then and there ought to have been declared and sworn as such mayor, &c.; concluding with a verification. Several other replications substantially the same. Issue upon the general replications. Demurrer to the special replications, assigning for causes, "that the same several respective replications do not directly deny or traverse any of the matters contained in the same several respective pleas of the said defendant, nor confess and avoid the same; and also for that the same several and respective replications do not directly answer the same several respective pleas, or any of

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them, but are, respectively, at most, argumentative answers thereto; and also for that the same several respective replications are multifarious and double; and also for that the said several respective replications do not contain any matter upon which pertinent and conclusive issues can be taken; and also for that the same several respective replications contain matter of evidence and not of allegation, and that all the matters contained in the same several respective replications might be given in evidence, under the issues before joined between the parties aforesaid; that the same several respective replications lead to great and unnecessary prolixity of pleading, and are, in other respects, evasive argumentative, insufficient, and informal." Joinder in demurrer.

Campbell, in support of the demurrer. The special replications are clearly bad, both in form and substance. They tender no material issue. It was perfectly impossible for the defendant either to take issue upon them, or to rejoin to them. They are all substantially the same, and the same argument will apply to them all. Suppose the defendant had rejoined that the fifty rejected votes were bad, and that issue had been found against him; still, it would not have followed that he was improperly elected. Suppose he had rejoined that the thirty-eight admitted votes were good, and that issue had been found against him; still, it would not have followed that he had a minority of good votes. Suppose he had denied the concluding averment of the replication, that the other candidate had a majority of good votes; then, he would have admitted that the fifty votes were good, and that the thirty-eight were bad. But the replication in effect admits the thirty-eight votes to be good, for it states the voters to be burgesses de facto, and the question whether they are burgesses de jure cannot be raised in this mode. A brief examination of the only two existing authorities upon the subject will make this proposition clear. *Symmers* v. *Regem*, in Error (*a*), was a writ of error from the Court

(*a*) Cowp. 489.

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of King's Bench in *Ireland*, in quo warranto, and one of the questions raised, was, whether on the trial of the rights of the elected to a corporate franchise, the rights of the voters to their corporate franchise could be gone into. Lord *Mansfield* said, "the general question has never been fully settled, though it has been touched upon in many cases. But this is settled, that no corporator is bound by surprise to go into the original qualification of any corporator in possession, who voted for him at his election, especially without notice." The case was, however, argued a second time, and Lord *Mansfield* then said, "the proposition is, that the Judge, on this information, should have done exactly what he ought to have done, if the title of these persons, who were common-council-men de facto, had actually been in question before him upon quo warranto. They were, de facto, members of the corporation, admitted, sworn, and in the actual enjoyment of the office. The question is whether the judge collaterally, at the trial, ought to have gone into the validity of these men's titles. Could the mayor have gone into it at the election? It is very clear he could not." And in conclusion his lordship added, "the present question is, whether, in a quo warranto against particular members, you can go into the title of other corporators de facto; and we are clearly of opinion you cannot." Now, that is a decisive authority to shew that the replications in this case are bad with respect to the thirty-eight voters alleged to have been improperly admitted to vote, because the replications themselves admit that those voters were burgesses de facto. *Rex* v. *W. Smith*(*a*) was a quo warranto for exercising the office of mayor of the borough of *Colchester*. There were several issues there: first, whether the defendant was elected by the then mayor and by the major part of the residue of the aldermen; second, whether the defendant was properly sworn in; and lastly, whether the person who presided and acted as mayor at the election was or was not mayor at the time. Lord *Ellenborough*, in the course

(*a*) 5 M. & S. 271.

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of his judgment, said, "as to the question, whether it is competent to impeach, upon a collateral issue concerning the rights of the elected, the title of the voter, if the case had turned upon it, I should have desired further time for consideration. The language of Lord *Mansfield* in *Symmers* v. *Regem* is certainly very strong; but, upon the competency to inquire into the validity of the election of *Hedge*, the presiding officer at the defendant's election, I cannot entertain a doubt:" and *Abbott*, J. said, that with reference to the first issue in that case, he could not distinguish it from *Symmers* v. *Regem*. Upon these authorities, then, these replications are clearly bad in law, and reason and justice are equally decisive against them. If in trying the right of the elected, the title of the electors could be gone into, it might be necessary for the defendant to take issue upon the right of every individual voter named in the replication, and the result would be an infinity of issues requiring a length and labour of investigation to which no Judge or jury would be competent.

G. R. Cross, contrà. The special replications are good both in form and substance. As respects their substance, the real question which they raise undoubtedly is, whether a relator, when inquiring into the title of the elected, can impeach the titles of the electors. This question comes now for the first time before the Court upon the record; it has never been decided: indeed it has never been fully and directly discussed. The first case in which it is alluded to is *Rex* v. *Latham* (a), which was a motion for a quo warranto information. The rule was made absolute on perfectly distinct grounds, but this point having been touched upon, Lord *Mansfield* said, "the crown may take what issues they think proper to shew usurpation. There is no instance of precluding the crown from insisting upon any objections that they shall be advised to take issue upon, in order to shew the defendant to have usurped the franchise

(a) 3 Burr. 1485.

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Therefore, we neither need to give, nor should give, any opinion upon the other points; nor does the line seem to be fully and clearly drawn and fixed, where the rights of the electors can be gone into at all, or how far they can be gone into, on the trial of the right of the elected." Then came the case of *Symmers* v. *Regem*, where the point was again raised, and where the titles of the rejected voters were to a certain extent taken into consideration, for it having been proved that some of them had been ousted of their franchises, evidence of their restoration was admitted. It is true that evidence of their having been originally illegally elected was rejected, Lord *Mansfield* being of opinion that the rights of the voters to their corporate franchise could not be gone into, without notice, either on the record, or collaterally, and after an undisputed possession of ten or twelve years. He laid great stress upon the want of notice, and upon the length of possession, and it should seem that those were the main grounds upon which his decision was founded; but neither of those circumstances applies to the present case, for here the objection appears upon the record, and the voters objected to are all recently elected, and their names are all set out in the replications. The next case is *Rex* v. *Mein* (*a*), in which Lord *Kenyon* says, "It is objected that the titles of electors cannot be impeached through the medium of the elected, and the case of *Symmers* v. *Regem* has been relied on; but there Lord *Mansfield* laid considerable stress on the voters having been in possession of their franchises for twelve years." Immediately after the case of *Rex* v. *Mein*, the statute 32 *Geo.* 3. c. 58, entitled "An Act for the amendment of the law in proceedings upon information in nature of quo warranto," was passed; and its provisions have an important bearing upon the present question. After providing, by s. 1, that the titles of corporate officers shall not be *directly* impeached by quo warranto information after an enjoyment of six years, it goes on to enact, by s. 3, "that if any person against whom any such

(*a*) 3 T. R. 596.

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information shall be exhibited, shall derive title under an election, nomination, &c. by any person, the title of such person against whom such information shall be exhibited, shall not be defeated or affected by reason or on account of any defect in the title of such person so electing, nominating, &c. in case such person under whom title shall be derived as aforesaid, was in exercise, de facto, of the franchise or office in virtue of which he was so elected, nominated, &c. at a period six years, at least, previous to the time of filing such information, and his title shall not have been questioned by any legal proceeding carried on with effect." Now, the object of that statute being to protect from impeachment or question, direct and indirect, the titles of corporate officers after an enjoyment of six years, goes, inferentially, far to shew that, before the statute passed, the legislature considered that the titles of such persons might be called in question in proceedings similar to the present; and, indeed, if before that time the law had protected the titles of electors from impeachment through the medium of the elected, the latter enactment was altogether superfluous. [*Bayley*, J. Is not that statute confined to the presiding officers of corporations?] It is submitted not; the words are very general: "the defendant to *any* information" is authorized to plead the statute. *Rex* v. *W. Smith* does not bear upon this question; it was decided upon a different ground, and cannot be regarded as an authority either for or against the present argument. The only remaining cases are two of much earlier date, in both which, however, the titles of electors were inquired into without any objection. The first is *Foot* v. *Prowse* (*a*). [*Bayley*, J. The question there was, not respecting the original title of the electors, but whether they were corporators de facto at the time when they voted.] The question tried was, whether they were at that time corporators de jure. [*Bayley*, J. Perhaps so, incidentally, because the two questions were so intimately connected, that it was im-

(*a*) 1 Str. 625; 2 Bro. P.C. 289. S.C.

possible to separate them in the evidence. The electors there necessarily ceased at the same time to be corporators de facto and de jure.] Still the question of title was gone into, as it was also in *Rex* v. *Hebden* (a). There, on an information against the defendant, as bailiff of *Scarborough*, he made title as elected under the bailiffship of *Batty* and *Armstrong*; and upon issue joined, whether they were bailiffs or not, a record of a judgment of ouster against them was read in evidence; and upon motion for a new trial it was held, that it was properly admitted, and a new trial was denied. These cases go to shew that the question may be entered into, and if so, these replications are good in substance. They are also good in form. The insertion of the rejected voters was necessary in order to raise the issue meant to be tried, namely, whether the majority of legal votes was tendered for the defendant or for the other candidate; and the introduction of the names of the parties was highly beneficial to the defendant, as it enabled him to provide himself with evidence respecting them. It is said that the replications raise an infinity of issues, but the fact is not so: for though there are several disputed facts put upon the record, they all, in effect, compose but one issue, namely, whether the defendant was duly elected, which was the real issue intended to be tried.

Campbell, in reply, was stopped by the Court.

Bayley, J. (b)—This information calls upon the defendant to shew by what authority he holds the office of mayor of the borough of *Monmouth*, to which he pleads a title by election according to the charter of the borough. To that plea the prosecutor might have replied non debito modo electus, and have compelled the defendant to go to trial upon that issue. Instead of so doing, he sets forth in his replication the names of thirty-eight persons who, he alleges,

(a) 2 Str. 1109; Andr. 389, S. C.
(b) *Abbott*, C. J. was absent.

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were improperly admitted to vote for the defendant, and the names of fifty other persons who, he alleges, tendered their votes for another candidate and were improperly rejected, and he thereby makes it appear that the other candidate had the majority of legal votes, and, therefore, that the defendant could not have been duly elected. He arrives at last at the simple conclusion of non debito modo electus, which was the only proper issue to be taken; but he arrives at it circuitously and argumentatively, and not by the correct and proper modes of pleading. Where the electors do not fill an office of a corporate nature, it is allowable, and indeed necessary, to question their titles in questioning that of the elected, because there is no other mode of doing it; and that is the principle laid down by Lord *Kenyon* in *Rex* v. *Mein*: but there is a sound and well established distinction in that respect between corporators and others, and it has been frequently decided that the titles of corporators cannot be tried in that mode, because there is another and more correct mode of impeaching them, if they are impeachable. I believe this is the first case in which an attempt has been made to raise upon the record the question whether persons exercising corporate privileges are corporators de jure. To allow such an attempt to succeed would be most mischievous; it would throw almost insuperable difficulties in the way of every election, and the time consumed in the subsequent investigation would render it impossible ever to obtain a fair and legal trial upon a quo warranto information. The cases cited on the part of the prosecutor do not support his case. *Rex* v. *Latham* goes no way towards deciding the question either way, for Lord *Mansfield* there treats it as quite unsettled. *Rex* v. *Hebden* is quite distinct from this case, for there the question was as to the title of persons to fill particular offices in virtue of which they claimed the nomination of the candidates; nor does that case establish the right of trying the title of electors even de facto: the utmost it shews is, that you may prove the question to have been previously determined, as was proved there, by pro-

ducing a judgment of ouster in a former quo warranto. In *Symmers* v. *Regem* the issue was non debito modo electus, under which every matter which can legally be investigated in such a proceeding may be brought into question. If a prosecutor were allowed to shew that some of the voters were unqualified persons, the result would only be that the defendant had not been duly elected. In that case, therefore, all such evidence was admissible as could properly be admissible upon this record, and yet it was there held that the titles of electors, corporators de facto, could not be impeached; and the decision there, in my opinion, proceeded, not upon the ground of want of notice, or of length of enjoyment, but upon the broad principle, that in an inquiry into the right of the elected, you cannot try the right of the elector, being a corporator de facto. *Rex* v. *Mein* is very strong against the prosecutor in this case, for Lord *Kenyon*, no mean authority upon such a subject, there considers it as settled law, that the title of electors cannot be questioned in an information against the elected, except where there is no other mode of questioning their title, which in this case there is; and he there recognizes the case of *Symmers* v. *Regem*, and distinguishes it from that of *Rex* v. *Mein*, for he says, "It is objected that the titles of electors cannot be impeached through the medium of the elected, and the case in *Cowper* has been relied on, but there the electors were members of a corporation, whose titles might have been questioned in quo warranto informations." These cases all preceded the 32 *Geo*. 2. c. 58, which, in my view of it, was evidently designed, not to alter the general existing state of things in corporations, certainly not to extend the power of objecting to the titles of corporators, but to afford a particular protection to the presiding officers of corporate bodies, and to them only, leaving the general law, as to the mode of trying the titles of electors, precisely as it found it. Subsequently to the statute came the case of *Rex* v. *Smith*, which stands upon a very different footing from the present. There the defendant had been elected

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to his office at a corporate meeting held before an individual acting as the then mayor, and unless that individual was mayor de jure at the time, the meeting was illegal, and the election void. Upon that ground it was held allowable for the prosecutor to go into the question of the presiding officer's title, but it by no means follows that he would have been allowed to question also the titles of the electors. Upon the whole, therefore, it seems to me, as the prosecutor's object by these replications was to rest his case upon the fact that some of the voters were liable to ouster at the time of the defendant's election, and as according to the rule of law, which must be considered as settled ever since the decision in *Symmers* v. *Regem*, that question cannot be raised in such a proceeding, that the replications in this case are bad, and that the defendant is entitled to judgment.

Holroyd, J.—It is a fundamental principle in pleading, applying equally to replications and to pleas, that you must either confess and avoid, or traverse, some material fact. The material fact in dispute here is, whether the defendant was or was not duly elected, which could be put in issue only by a direct denial of the validity of the election. But instead of doing that, the prosecutor has replied a variety of facts, from which he argumentatively arrives at the conclusion of non modo debito electus. Now that he cannot do, and upon that short ground I am clearly of opinion that these replications are bad. The question of title de facto may often be attended by subordinate questions, very nice and difficult to answer, and may sometimes be so closely blended with the question of title de jure, as to render their separation impracticable. But while a man is in possession of an office, his title cannot be questioned in the mode here attempted. When judgment of ouster has been obtained against him, he ceases to be in possession, and such a judgment, if obtained bonâ fide, is legitimate and conclusive evidence against him: *Rex* v. *The Mayor of York* (a). The

(a) 5 T. R. 66.

first objection, however, is decisive of this case, and upon that our judgment must be for the defendant.

Littledale, J. concurred.

Judgment for the defendant.

Down *v.* Halling and others.

A banker's check, dated the 16th, for 50*l.* payable to *A.* or bearer, was changed on the 22nd *November*, by a tradesman, for a strange woman, who purchased some goods at his shop, and next day he received cash for it at the banker's. On the 25th, *A.*, the payee, gave notice to the bankers to stop payment of the check:—Held, in an action by *A.* against the tradesman for money had and received to his use, first, that it was not incumbent on the plaintiff to shew how the check got out of his possession; and second, that if the jury were satisfied that the defendant had taken the check (which was overdue five days) under such circumstances as ought to excite the suspicion of a prudent man, even though he gave valuable consideration for it, and acted bonâ fide, the true owner had a right to recover the amount; for a banker's check, overdue, stands on the same footing as a bill or note put into circulation after its date has expired, and the holder must shew title in his immediate payer before he can retain the proceeds.

THIS was an action for money had and received by the defendants to the plaintiff's use. Plea, non assumpsit. At the trial before *Abbott*, C. J. at the adjourned sittings in *London* after last *Easter* term, it appeared in evidence that on the 16th *November*, 1824, the plaintiff received a check from his brother for 50*l.*, drawn on the same day, upon the banking firm of Sir *Peter Pole*, *Thornton* & Co., payable to the plaintiff or bearer. In the afternoon of the 22d *November*, between three and four o'clock, a female, of apparent respectability, came to the shop of the defendants, who are linen-drapers in *Cockspur Street*, and purchased goods to the amount of 6*l.* 10*s.* and tendered in payment the check in question. The shopman who served her, took the check to one of the defendants for the change. Questions were then asked of the woman, and she said she was upper servant in a gentleman's family. She was desired to write her name and address on the check, but she said she was an indifferent writer, and requested the shopman to write it for her, which he did at her dictation. Her unembarrassed behaviour and apparent respectability disarmed all suspicion. The change was immediately given to her, and she carried

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the goods away, after declining to have them sent to her residence. The defendants were too busy to send the check for payment at the banking-house that afternoon, but on the following morning, between nine and ten o'clock, it was presented, and paid without objection. On the 25th *November*, the plaintiff, for the first time, gave notice at the banking-house not to pay the check when it should be presented. An inquiry was then instituted by the bankers how the defendants became possessed of the check, and they gave the account of it above mentioned. Search was made after the woman, but no such person was to be found by the name and address which she had given. No proof whatever was given of the manner in which the check had passed out of the plaintiff's hands. On the part of the defendants it was submitted, first, that as they had bonâ fide taken the check and given full value for it, the action could not be maintained; and second, that, at all events, the plaintiff ought to give some evidence that the check had been lost by, or stolen from him; for otherwise the presumption was that the person who presented it to the defendants had a good title to it. The Lord Chief Justice was of opinion that, under the particular circumstances of this case, such evidence was unnecessary, even if it could be adduced; and then left it as a question of fact for the jury, whether the defendants had not been guilty of negligence; for if the jury should be of opinion that the check, presented, as it was, so many days after it was drawn, was tendered to the defendants under such circumstances as ought reasonably to excite suspicion in the minds of persons conversant with business, and induce an inquiry into the right of the party who presented it, then the plaintiff would be entitled to a verdict. The jury found for the plaintiff.

Denman, C.S. on a former day, moved for a rule to shew cause why the verdict should not be set aside and a nonsuit entered, or why there should not be a new trial granted, first, on the ground that the plaintiff had made out no title to

recover, and second, on the ground that the jury had been misdirected. First, it was essential to the plaintiff's case, to shew under what circumstances the check passed out of his hands. The assumed ground of the action was, that the check had been lost or stolen in the interval between the 16th and 22nd *November*, 1824. Now there was not a particle of evidence as to the manner in which it parted from his possession. The reasonable presumption to be drawn from the facts proved was, that he had paid it away, and that it thereby got into circulation, or that the woman who presented it to the defendants was his agent. It was therefore a preliminary step, going to the very gist of the action, to shew that it passed from him involuntarily or by tortious means. The onus probandi lay upon the plaintiff, and in the absence of such proof, he had no right to maintain the action. The want of promptitude in stopping the check, assuming it to have been lost or stolen, rendered such evidence still more necessary. Secondly, assuming that there was enough to call upon the defendants for an answer to the action, it is submitted that they gave a complete answer to it, and that the true question in the case was not left to the jury. The question put to them was, whether the defendants had been guilty of negligence; the learned judge telling them, that if they thought the defendants had taken the check under such circumstances as ought reasonably to excite suspicion in the minds of persons conversant with business, the plaintiff had a right to recover. Now, the true question for them was, whether the defendants had acted without mala fides, for if they did, then, in point of sound reason and justice, they had a complete answer to the action. It cannot be denied that the defendants gave full value for the check, and took it bonâ fide. There was a perfect absence of mala fides, nor was it pretended that there was any thing unfair in their conduct in the transaction. Until the late case of *Gill* v. *Cubitt* (a) it was the prevailing opinion, that if a person gives good consideration for a negociable

(a) Ante, vol. i. 324.

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security, and takes it bonâ fide, he has a right to it against all the world. [*Bayley*, J. That case does not at all shake any doctrine prevailing theretofore. That case proceeded on the foundation that the plaintiff had not taken the bill bonâ fide, but, on the contrary, had taken it out of the usual course of business.] That was certainly a very strong decision, and goes a great way to shake the received opinion respecting the inviolability of the right of a bonâ fide holder of a bill, who has given valuable consideration. It determined that he who received a bill, under circumstances of the slightest suspicion, is bound to exercise the utmost degree of caution in ascertaining the title of the person of whom he receives it. In that case it was left to the jury to say, whether the plaintiff had taken the bill under such circumstances as ought to have excited the suspicion of a prudent and cautious man. Admitting that the mode of presenting the present case to the jury was warranted by that decision, still it is submitted that the total absence of mala fides ought to have been left to them, as an essential part of the question. Where a party confessedly acts bonâ fide, and gives full value for a banker's check, it would be introducing a new condition in transactions of this nature, to hold, that if he is guilty of negligence, in taking it under circumstances which ought to raise reasonable suspicions in the mind of a man conversant with business, he has no locus standi in a court of justice. That surely would be a corollary not warranted by sound reason or justice. [*Bayley*, J. If a party takes a bill of exchange which is overdue, he takes it at all hazards. When ought a check upon a banker to be presented?] It is not an uncommon thing to keep a check for several days before it is presented. [*Bayley*, J. From the nature of a banker's check, it ought to be carried in promptly for payment, and not allowed to circulate currently in the world. Suppose a check given to a payee, and he thinks proper to keep it several days, and in the mean time the banker fails,—upon whom would the loss fall, the drawer or the holder of the check? If a check, which is not an

instrument in general currency, is presented to a tradesman several days after it is drawn, ought he not to make some reasonable inquiry, and exercise common caution, before he takes it?] The question here is, who is to bear the loss; the person who gives good and valuable consideration, or he who, instead of presenting the check for payment immediately, keeps it until by his own carelessness and want of caution it passes into the world and becomes current. Surely the person who bonâ fide takes the check, under such circumstances, ought not to be the sufferer. The question of mala fides was here never left to the jury, for upon that ground alone could the defendants have been liable. Mere negligence on their part, even supposing there was sufficient in the transaction to awaken their suspicion, ought to have no effect upon the verdict. In this view of the case *Miller* v. *Race* (*a*), *Grant* v. *Vaughan* (*b*), *Peacock* v. *Rhodes* (*c*), and *Lawson* v. *Weston* (*d*), are authorities. The case of *Egan* v. *Threlfall* (*e*) was decided upon the mala fides of the defendant's conduct, and there was enough there to warrant the conclusion drawn by the jury. On these grounds therefore, first, that the plaintiff produced no evidence of the manner in which the check got out of his possession, and second, that the case was improperly left to the jury, it is submitted that the case ought, at least, to be reviewed in a second trial.

ABBOTT, C. J.—At the trial it was certainly urged, as matter of observation to the jury, that there was no proof of the loss of the check; but to that it was answered, that as the plaintiff proved his property in it, by calling the drawer, the onus lay upon the defendants to shew, by satisfactory evidence, that the check came into their hands by lawful means; and to that I acceeded. My learned brothers are perfectly satisfied upon the second point, so strenuously urged by Mr. *Denman*, but there is some little doubt on

(*a*) Burr. 452. (*b*) 3 Burr. 15, 16. (*c*) Doug. 611.
(*d*) 4 Esp. 56. (*e*) Ante, vol. v. 326. *n*.

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the minds of some of us, whether the plaintiff should not have given some evidence of the manner in which the check got out of his hands, and therefore it is fit we should take some time to consider before we deliver our opinion upon it. This, however, would only go to a new trial, no point having been reserved for the defendants.

Bayley, J.—I am of opinion that the second point is clearly against the defendants; and I think the case was left to the jury in a way of which the defendants not only have no reason to complain, but in a way much more favourable to them than they were entitled to. It is only by not attending to the distinction between bills of exchange and promissory notes which are current, and those which are overdue, that any question whatever could be raised in this case. When a party takes a bill of exchange or promissory note which is overdue, he takes it at his peril, and he has no right to recover upon it, if the person from whom he takes it has no title to it, or if it is proved to have been lost by the true owner. In this case the check in question was not calculated, or intended to be used, for the ordinary purposes of circulation; it was intended for immediate payment. Now it does not require any authority for saying, that it is the duty of the party who takes such an instrument, to present it for payment either on the day on which he receives it, or, at the utmost, on the following day; for after the expiration of that period, it stands in the same situation as a bill, note, or order for money, which is post due, and the same legal consequence follows if there is any infirmity of title in the person from whom it is received. Here the check is drawn on the 16th *November*, and it is not offered for payment to the defendants until the 22d. Therefore, at the time when it was offered, it seems to me that it stood in the same situation as a bill post due, and consequently the defendants could have no better title to sue upon it or retain the money arising therefrom, than the party from whom it was taken. In order to establish a right against the loser of the check, they ought

to have shewn that they took it within such time as would have enabled them to sue upon it. For these reasons I am of opinion that the case was left most properly to the jury; and I have thought it my duty to point out the distinction between this and other cases, in order that it may not be supposed we are laying down new rules of law, not sanctioned by our predecessors.

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HOLROYD, J.—I think the check in the present case must be considered in the same light as a bill of exchange or promissory note which is post due. It has been laid down, over and over again, in numerous cases, that the person incautiously taking a security of that description takes it at his peril. That is a known principle of law, and is strictly applicable to this case. In most of the cases where the title to lost or stolen bills or notes has come in question, they have been lost or stolen before they became due, in which cases the question would be different, for there the party does not take them at his own peril, and the question of mala fides or bona fides might properly arise. Bankers' notes, not payable to any particular person, would stand on the same footing as instruments which are in the ordinary course of circulation, and the same degree of vigilance in taking them might not be reasonably expected. But this is the case of a check which is payable immediately, and if a party accepts it in payment after it is due, he accepts it at his own peril. If it is presented to him the day after it is drawn, that is a circumstance which ought to awaken his suspicion; but if it is not presented, as in this case, until after the lapse of several days, the grounds of suspicion are much stronger, and if he takes it, it must be at his own peril. On this ground I am of opinion that the defendants were liable to the present action (*a*).

The COURT having taken time to advise on the other point, judgment upon it was now delivered by

(*a*) *Littledale*, J. was absent.

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ABBOTT, C. J.—The point which we reserved for consideration was, whether it was necessary for the plaintiff, in order to establish his right of action against the defendants, to shew at what time and in what manner the check in question got out of his possession. The answer given to this objection at the trial was, that the plaintiff having proved property in the check, it was incumbent on the defendants to shew how it became theirs. The instrument was drawn upon a banker, and made payable to the plaintiff or bearer; and it was proved, by the brother of the plaintiff, that he, the brother, was the drawer of the check, and that he had delivered it to the plaintiff for the use of the latter. By that delivery, therefore, the property in the check clearly vested in the plaintiff originally. It was further proved that the check came into the hands of the defendants five days after it was given to the plaintiff, and five days after the time at which payment might have been demanded of the bankers on whom it was drawn. When this case was argued on a former day, some of my learned brothers intimated an opinion, very distinctly, that an instrument of this kind, payable to bearer on demand, and coming into the hands of another person so many days after its date, was to be considered in the same light as an overdue bill of exchange or promissory note, and that it was incumbent on the holder to shew that the person from whom he took it had a good title. I fully concur in that opinion, and therefore, as respects this particular description of instrument, it is not necessary to lay down any general rule. It is not necessary for us to decide whether the loser of property shall or shall not in all cases be required to shew how he parted with the possession, in order to enable him to establish his right against the person who has the apparent possession. I must say that I should feel great reluctance in laying down, judicially, any general rule requiring the loser to produce such evidence before he could recover in a court of justice; and for this reason, that in many cases it would be utterly impossible for a person who had lost the property to give

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any evidence upon the subject. The owner himself is precluded from giving evidence in a court of law. It may sometimes happen that the property is taken privily from his person, and in such case his evidence would be inadmissible, although he is the only person who knows anything of the manner of the loss. In many cases valuable articles are stolen from a private drawer or escruitore, and it would be utterly impossible in such cases to shew, by any legitimate evidence, how the property was taken away. Suppose cattle are taken in the night-time from a field, in many cases the owner would have great difficulty in shewing, by evidence, in what manner the theft was committed, and yet, if the argument in this case were to prevail, no man could establish his title to the property unless such evidence were adduced. In this view of the subject, I should be extremely unwilling to lay down any general rule that the loser of property shall give evidence of the manner of the loss, and that before he can be allowed to call upon the person who has the possession of it, the latter shall be at liberty to say, "you must shew me how it got out of your possession before I can be called upon to restore it." That would be the effect of a general rule if laid down, but which we do not affect to propound. But in this particular case such a rule is unnecessary; for here the check, which was clearly proved to have been the plaintiff's property, is traced to the possession of the defendants five days after it was payable, and therefore, in such a case, I think the plaintiff, without any special proof of the manner of the loss, is entitled to call upon the defendants to shew that they received it of a person from whom they could derive a lawful title. That being the only point reserved for our consideration, I think the rule for a new trial must be refused.

Rule refused.

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An order, directed by the Insolvent Debtors' Court, to a gaoler, to discharge a debtor from his custody, is sufficient evidence of the prisoner having been discharged under 53 *G.* 3. c. 102. without producing the judgment of the court or a certified copy thereof.

THIS was an action for goods sold and delivered. The defendant pleaded his certificate under a commission of bankrupt awarded against him since the plaintiff's cause of action arose. Issue thereon. At the trial before *Littledale*, J. at the *London* adjourned sittings after last *Michaelmas* term, the case was this:—In *February*, 1823, the plaintiff had given credit to the defendant for goods to the amount of 119*l.*, and in *April*, in the same year, the defendant committed an act of bankruptcy, and was duly declared a bankrupt, but paid nothing under his commission. In order to obviate the effect of the defendant's certificate, the plaintiff proposed to prove that in 1815 he had been discharged under the Insolvent Debtor's Act, 53 *Geo.* 3. c. 102, and consequently was still liable to this action by operation of the stat. 5 *Geo.* 2. c. 30. s. 9, by which it is enacted, that after the passing of that act the future effects of a bankrupt who has been discharged by any act for the relief of insolvent debtors, shall remain liable to his creditors, "unless the estate of such person, against whom such commission shall be awarded, shall produce clear, after all charges, sufficient to pay every creditor under the said commission fifteen shillings in the pound for their respective debts." For the purpose of proving that the defendant had been discharged under the Insolvent Debtors' Act in 1815, the plaintiff called, first, the keeper of *Lancaster* castle, who produced an order of the Insolvent Debtors' Court, as constituted by the 53 *Geo.* 3. c. 102, by virtue of which he discharged the defendant out of his custody, which order recited that upon hearing the petition of the prisoner, the court had ordered and adjudged him to be entitled to the benefit of the act; and it appearing to the court that he had in all things conformed to the directions of the court and the act of parliament, the court ordered him to be forthwith discharged out

of custody. Secondly, the plaintiff called a clerk from the office of the chief clerk of the Insolvent Debtors' Court, as constituted by 1 *Geo.* 4. c. 119, who produced a certificate from Mr. *Massey*, the chief clerk appointed under that act, certifying that on the 8th *September*, 1815, an order was made by the then Insolvent Debtors' Court, directing *Isaac Isaacs* to be discharged forthwith as to the several debts and sums of money mentioned in his schedule, filed in the said court. On the part of the defendant it was objected that neither the order produced by the gaoler, nor the certificate of the chief clerk, was sufficient evidence that the defendant had been duly discharged under the Insolvent Act, and consequently that he was entitled to the benefit of his plea of bankruptcy. The learned judge yielded to the objection, and directed a nonsuit, but gave the plaintiff leave to enter a verdict for the sum for which the action was brought. The Court having, in *Hilary* term, granted a rule nisi, pursuant to the leave given,

Gurney now shewed cause. The single question for the consideration of the Court is, whether the plaintiff gave legal evidence of the order for the defendant's discharge under the Insolvent Debtor's Act. First, as to the warrant directed to the keeper of *Lancaster* castle, that was clearly insufficient, because it must have been founded upon some previous act of the court. An attested copy of the judgment ought to have been produced, because it is that alone which gives validity to the proceeding. It is clear that the judgment of the court would not be transmitted to the keeper of *Lancaster* castle; for that must remain with the court, and might be found on its records. Then, secondly, the certificate of the present clerk of the court was insufficient, because it did not purport to be a *copy* of the judgment, but merely the conclusion which the clerk drew from something which he found in the office; and it is not competent to the clerk to give his description of the contents of an instrument on the files of the court. To make the judg-

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ment available, a certified copy ought to have been produced. The certificate produced was not in conformity with sec. 45. of 1 *Geo.* 4. c. 119, which enacts that a true *copy* of every judgment, signed by the proper officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such judgment, shall at all times be admitted in all courts whatever, as legal evidence of the same respectively.

Denman, C. S. and *Abraham*, contrà. The fact that the defendant was actually discharged out of custody by virtue of the order delivered to the keeper of *Lancaster* castle, is sufficient to deprive the defendant of the benefit of his plea. Unless the order, so delivered, is itself to be considered as an original, the discharge of the defendant is altogether null and void. If there be any more formal judgment, it lies upon the other side to shew its existence, but none was shewn to exist. Primâ facie there is no other judgment but that stated in the warrant to the gaoler, and if the prisoner was in fact discharged by force of the directions therein contained, it must be treated as the original, and as conclusive evidence upon the subject. Then, as to the certificate of the present chief clerk, it certainly goes only to state the fact that the defendant was ordered to be discharged on such a day in 1815, but that, coupled with the other evidence, is sufficient. [*Bayley*, J. Without power given to him by the statute, the chief clerk has no right to draw conclusions, or inferences, and sum up the contents of any instrument on the files of the court. It is his duty to certify a true *copy*.] This may be treated as a certified copy of the entry of the judgment contained in the books. There may have been no formal judgment entered, but simply a memorandum that the defendant was ordered to be discharged, in which case the order afterwards drawn up and delivered to the gaoler, must be considered as the original. [*Bayley*, J. If evidence had been given that such was the course of the court, and that no other order was made, that would have done.] In *Carpenter* v.

White (a) it was held that a paper, purporting to be a copy of the original discharge of an insolvent, and signed by the clerk of the proper officer of that court, with the impression of the seal affixed to it, was admissible in evidence to prove such discharge, without the production of the certificate thereof, or proof of its being an examined or attested copy,

ABBOTT, C. J.—In this case the evidence of the discharge was offered against the prisoner, but in general it is offered in his favour. Our judgment, however, in construing the act, must be the same, whether it is offered against or for him, and the object of the act of parliament being for the relief of persons in the situation of the defendant, it seems to me that we ought to put a liberal construction upon it in furtherance of that object. This case arises upon a discharge under the 53 *Geo.* 3. c. 102, and we are to see whether there was offered at the trial any sufficient evidence of a discharge such as is required by that act. Now, neither that nor any other act for the relief of insolvent debtors, operates as a discharge of the debt, for the future effects of the debtor still remain liable. Under the more recent acts the debtor is not liable to be sued at all, but a judgment is entered up in one of the superior courts against his future effects in favour of his creditors; so that the debt itself is not discharged, though the person of the debtor is. The act of the 53 *Geo.* 3. c. 102. is drawn, I will not say loosely, because I have learned from experience, and attention to this and other acts on the same subject, that it is exceedingly difficult to prepare beforehand a set of regulations applicable to all cases for which there may be occasion to provide, but this I may say, that it is not expressed in language free from ambiguity. We are now to see what order of discharge the Insolvent Debtors' Court is required to make under the 53 *Geo.* 3. It certainly is not an order to discharge the debt, but only the person of the prisoner from custody. The thing required to be done is mentioned in

(a) 3 J. B. Moore, 231.

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the 10th section; and that section enacts, "that in case the court shall be of opinion that the prisoner is entitled to the benefit of the act, then it shall so order and adjudge, and in such order specify the several creditors and the persons against whose demands the prisoner shall be deemed by the court entitled to be discharged;" and then, after directing several other things to be done, enacts "that the court shall appoint an assignee or assignees of the estate and effects of the prisoner, for the purposes of that act, and shall order proper conveyances and assignments of such estate and effects to be made by the prisoner according to the act, together with an engagement, to be executed by him, to pay so much of the just debts and demands of the several persons against whom such prisoner shall by the court be adjudged entitled to the benefit of the act, as shall not be paid out of his estate and effects to be conveyed and assigned by him for such purpose, in case he shall at any time thereafter be enabled to pay such debts and demands, or to pay such part or parts thereof, as he shall be able at any time to pay." All these are steps preparatory to the discharge, whatever it may be. Then it enacts "that upon the due execution of such conveyances, assignments, and engagements, &c. the court shall order the prisoner to be discharged from custody." Therefore the only order for discharge under this act of parliament, which the court is required to make, is an order for his discharge from custody. Now, in this instance did the court make such an order? The original order was produced at the trial. It recites, very accurately, "that upon the hearing of the matter of the petition of the prisoner, *Isaac Isaacs*, the court ordered and adjudged the insolvent to be entitled to the benefit of the act; and it appearing that the prisoner had in all things conformed to the directions of the court and the act of parliament, the court ordered the prisoner to be forthwith discharged from custody." That being the only order directed to be made, I think we must consider it to be the order alluded to in the other parts of the act; and also the order for discharge, which is mentioned in general

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terms in the 5 *Geo.* 2. c. 30. s. 9. It seems to me, therefore, that the order produced at the trial was sufficient evidence of the defendant's discharge to bring him within the provisions of the last-mentioned act, and deprive him of the protection of his certificate as to future effects. As to Mr. *Massey's* certificate, that is out of the question, because it is clearly not in conformity with the directions of the 1 *Geo.* 4. c. 119. s. 45. which says, that a true *copy* shall be deemed and taken as evidence. I am therefore of opinion that the rule must be made absolute.

BAYLEY, HOLROYD, and LITTLEDALE, J's. concurred.

Rule absolute for entering a verdict for the plaintiff.

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The KING *v.* The JUSTICES of SOMERSETSHIRE.

Section 80. of the General Highway Act, 13 *G.* 3. c. 78., which takes away the certiorari, does not extend to cases where the justices at sessions act wholly without jurisdiction. Therefore, where the justices at petty sessions made an order for the allowance of the accounts of a surveyor of highways, such accounts had not previously been verified before one justice, pursuant to the requisites of section 48 of the act:—Held, that they acted wholly without jurisdiction; that their order was not a proceeding had pursuant to the act; and, consequently, that certiorari lay to remove it into this Court, for the purpose of having it quashed.

ON shewing cause against a rule nisi, which had been obtained for removing into this Court by certiorari an order of justices at petty sessions for the allowance of the accounts of the surveyor of highways for a parish in the county of *Somerset*, for the purpose of having the same quashed, the question was, whether the certiorari was taken away by the provisions of the General Highway Act, 13 *Geo.* 3. c. 78. s. 80.

Adam shewed cause. The certiorari is clearly taken away in this case by the operation of the 80th section of the General Highway Act. That section expressly declares, that "no proceedings to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by certiorari or any other writ or process whatsoever (except as hereinbefore mentioned), into any of his Majes-

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ty's Courts of Record at *Westminster*." The exceptions there alluded to are contained in the 24th section, and apply exclusively to cases of presentments of roads out of repair by justices on their own view; consequently, this not being one of the excepted cases must fall within the general rule. In *Rex* v. *Casson* (*a*) it was held that certiorari did not lie to remove an order made by two justices, and confirmed by the sessions, for diverting a road, *professedly* under the authority of the General Highway Act; and in *Rex* v. *The Justices of St. Alban's* (*b*) it was held that certiorari did not lie to remove the appointment of a surveyor under the General Highway Act. Upon these authorities it is manifest that the certiorari does not lie in this case, and this rule consequently must be discharged.

Campbell, contrà. The Court have jurisdiction to grant the certiorari prayed for in this case, and will feel itself bound to exercise it, because there is no other remedy against this order. The order was made at the petty sessions, without any previous examination of the accounts by a justice. Now unless the accounts have first been examined by a justice, and verified before him, the petty sessions have no power to make an order for their allowance, for that preliminary step is expressly required by the 48th section of the act; consequently, the petty sessions had no jurisdiction to make this order, and the order is not a proceeding had or taken in pursuance of the act, and may be removed by certiorari. [*Abbott*, C. J. If they had no jurisdiction, the order may, perhaps, be properly treated as a nullity; and then there would be no necessity for a certiorari.] A certiorari is still necessary, because as no appeal lies to the quarter sessions against the allowance of the accounts of the surveyor of highways, *Rex* v. *The Justices of the West Riding of Yorkshire* (*c*) and *Rex* v. *Mitchell* (*d*),

(*a*) Ante, vol. iii. 36.
(*b*) Ante, vol. v. 538.
(*c*) 5 T. R. 629.
(*d*) 5 T. R. 701.

unless the certiorari remains, there is no remedy at all against such an order, however irregular or illegal it may be.

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Abbott, C. J.—It seems to me that the rule for a certiorari obtained in this case ought to be made absolute. The cases last cited are decisive to shew that there is no appeal to the quarter-sessions from the allowance of the surveyor's accounts, either by a single justice or by the justices at petty sessions; therefore, unless the certiorari remains where the justices at petty sessions act without jurisdiction, a party aggrieved by their act will be absolutely without remedy. Now in the former of those cases it was said by *Grose*, J., speaking of the General Highway Act, "the clause which takes away the certiorari, does not extend to a case where the justices at sessions acted wholly without jurisdiction;" and we ourselves in the very recent case of *Rex* v. *Casson* (*a*) quashed the writ of certiorari upon the ground that the order there was a proceeding taken in pursuance of the act. In this case it seems to me that the justices having acted wholly without jurisdiction, the order so made by them is not a proceeding taken in pursuance of the act, and consequently that the clause taking away the certiorari does not apply to this case. For these reasons I am of opinion that this rule ought to be made absolute.

The other judges concurred.

Rule absolute.

(*a*) Ante, vol. iii. 36.

Harris v. Saunders.

A judgment recovered in *Ireland*, since the Union, is not a record in *England*, and may, therefore, be declared on in assumpsit.

ASSUMPSIT on a judgment recovered in the Court of Common Pleas in *Ireland*, in *Hilary* term, 1821. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Trinity* term, it was contended on the part of the

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defendant, that since the *Irish* Union Act, 39 and 40 *Geo.* 3. c. 67., a judgment recovered in *Ireland* had become a record, and could not be declared on in assumpsit, but in debt only, and consequently it was urged that the plaintiff must be nonsuited. The learned judge declined to nonsuit, and expressed a strong opinion against the objection, but he reserved the point, with liberty to the defendant to move upon it. The plaintiff having obtained a verdict,

J. Evans, in *Hilary* term last, moved for a rule nisi, either for a new trial, or in arrest of judgment, and cited *Collins* v. Lord *Mathew* (*a*), *Parkins* v. *Stuart* (*b*), and *Walker* v. *Witter* (*c*). The Court having granted a rule nisi, in arrest of judgment only,

Marryat and *Selwyn* now shewed cause. Before the passing of the 39 and 40 *Geo.* 3. c. 67. a party might sue upon an *Irish* judgment either in debt, or assumpsit, as he thought proper. There is nothing in the act which at all varies or affects the previously existing law upon the subject, and, consequently, a party has the same liberty now. *Walker* v. *Witter* (*c*) is no authority for the defendant, because though it was there held, that debt would lie upon a foreign judgment, it was admitted on all sides that assumpsit would lie also, and that the plaintiff had his option which form of action he would adopt. *Collins* v. Lord *Mathew* (*a*) is equally inapplicable. That case only decided that since the Union the judgments of the *Irish* courts are properly pleadable as records; the question as to the proper form of action did not arise. But the case of *Vaughan* v. *Plunkett* (*d*), decided in the year 1810, is conclusive in favour of the present plaintiff. That was assumpsit upon a judgment in the court of *exchequer* in *Ireland*. It was objected for the defendant, that since the Union assumpsit could no longer be maintained upon an *Irish* judgment, because it

(*a*) 5 East, 474.

(*b*) 9 Price, 1.

(*c*) 1 Doug. 1.

(*d*) 3 Taunt. 85. note (*a*).

was a record of the United Kingdom, and might be brought over to the House of Lords here. *Chambre*, J., at nisi prius, said, that such judgments were removeable to the House of Lords before the Union, and was of opinion that the action was maintainable, but reserved the point; and the plaintiff under his directions had a verdict, which the defendant never attempted to disturb. Now, unless some contrary decision can be shewn, that case must be taken to be law; and if so, it is an answer to the present motion.

Evans, contrà. Assumpsit will not lie upon a record; by the operation of the Act of Union an *Irish* judgment is a record: consequently assumpsit cannot be maintained upon it. Nul tiel record would be a bad plea to this declaration, and that proves that the form of action is wrong. [*Abbott*, C. J. What would be the effect in a case of assets? Would an *Irish* judgment have priority, as a specialty, over simple contract debts? That point goes to the substance, and not merely to the form.] Perhaps no case can be found in which that particular question has been raised, but there are several cases in which, in other respects, and for other purposes, the courts have treated *Irish* judgments as records. In *Collins* v. Lord *Mathew* it was determined that they were properly pleadable as records, and might be brought before the House of Lords of the United Kingdom as records. In *Adamthwaite* v. *Synge* (*a*) it was held, that to prove an examined copy of an *Irish* judgment, it was not enough to examine the copy with a record produced in the room over the four courts of *Dublin*, where the records of the superior Irish courts are kept, without seeing from whence the record was taken, and knowing the person who produced it to be an officer of the Court. *Parkins* v. *Stewart* (*b*) shews that it has been the practice since the Union to declare in debt on *Irish* judgments, and to plead nul tiel record.

(*a*) 4 Camp. 372.

(*b*) 9 Price, 1.

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Abbott, C. J.—If an *Irish* judgment be a record, in the full meaning of the term, it would operate as a charge upon real property in *England;* and vice versâ. It is to me a new proposition that it should so operate, and I doubt, at least, whether it can properly have such an extent. The 8th article of the Act of Union does not profess to alter the law as it previously stood upon this subject, but the proposition to which I have alluded would, as it appears to me, most materially alter that law. As at present advised, therefore, it seems to me that assumpsit is still maintainable upon an *Irish* judgment, because it is not in the strict sense of the word a record. The question, however, is in some respects new, and in all respects important, and we will look farther into the authorities before we pronounce a final opinion upon it.

Cur. adv. vult.

Judgment was now delivered by

ABBOTT, C. J.—Since this case was argued we have been furnished by Mr. *Selwyn* with a note of the case of *Otway* v. *Ramsay* (*a*), by which it appears to have been solemnly decided, after two arguments, that previous to the Union a judgment recovered in *England* had not in *Ireland* the force and effect of a judgment of record in that country. The effect of that decision is that a judgment recovered in the one country cannot be considered as a matter of record in the other, so as to bind land, or to take priority as a specialty debt. We do not mean to lay it down as settled law, that debt may not be maintained upon an *Irish* judgment: it is not necessary to go that length. But if it is to rank as a record here, it must have all the operation and produce all the consequences appertaining to a record; some of which would be, that it would bind lands, and would take priority

(*a*) 2 Stra. 1090. 14 Viner, 569.

as a specialty debt in the distribution of personal assets. We have made the inquiry of a very learned person, whether, in the distribution of assets an *Irish* judgment is treated like an *English* judgment, and considered as entitled to priority; and we learn from him that in practice it is not. We think that practice right, and that we ought to act upon it; upon the whole, therefore, we deem it necessary to discharge the rule for arresting the judgment in this case.

Rule discharged.

Lee v. Levy.

Tuesday, June 21.

Matter of defence arising after action brought, cannot be pleaded in bar of the action generally, and therefore cannot be given in evidence under the general issue.

ASSUMPSIT by plaintiff as second indorsee against defendant as indorser of a bill of exchange dated 17th *April*, 1821, for 50*l.* payable at two months, drawn by one *Jackson* upon and accepted by one *Buyers*, and indorsed by *Jackson* to defendant, and by defendant to plaintiff. Plea, non assumpsit. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Michaelmas* term, the plaintiff proved the signatures of the several parties to the bill, its presentment for payment when due, its dishonour and due notice thereof to the defendant; and that the plaintiff had immediately afterwards commenced actions by original against the acceptor and the defendant. On the part of the defendant it was proposed to prove that pending those actions, namely, on the 15th *September*, 1824, the plaintiff took from the acceptor a warrant of attorney for 71*l.*, the amount of the debt and costs, payable by instalments, 10*l.* on the execution of the warrant of attorney, and 5*l.* at the end of every week afterwards, until the whole was paid; and in case of default in any one payment the whole of the residue to be considered due, and judgment to be entered up and execution levied; and that the acceptor regularly paid the instalments down to the 27th *October*, and

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then made default; and this, it was contended, operated in point of law as a discharge of the defendant. For the plaintiff it was answered, first, that the warrant of attorney being taken after action brought against the acceptor, and the defeasance being to pay by instalments, which would all become due before the period when judgment could be obtained in the ordinary course, the defendant had sustained no injury, and was not discharged; and secondly, that as this was a matter of defence arising after the commencement of the action, it could not be given in evidence under the general issue, but, ought to have been pleaded specially. The Lord Chief Justice received the evidence but reserved the point. The plaintiff, in reply, endeavoured to shew that the warrant of attorney was taken with the knowledge and approbation of the defendant, but the evidence upon that point being contradictory, the Lord Chief Justice left it to the jury, directing them to find for the plaintiff if they believed that the defendant had assented to the arrangement respecting the warrant of attorney, and if not, to find for the defendant. The jury found for the defendant, and the plaintiff had leave to move to enter a verdict for him upon the point reserved.

Brougham, in *Hilary* term last, moved accordingly, and obtained a rule nisi, against which

Gurney and *Chitty*, on a former day, shewed cause. The jury have found that the warrant of attorney was taken without the knowledge or approbation of the defendant; therefore the general rule of law, that where time is given to the acceptor, a subsequent indorser is discharged, unless it is done by his consent, applies to this case. Then the only question is, whether the case is varied and taken out of the general rule, by the fact that the warrant of attorney was taken after the action against the acceptor had been commenced. It is submitted that it is not. By accepting the warrant of attorney the plaintiff forfeited the benefit of his action against the acceptor, so long as the instalments

were regularly paid; and if he had proceeded in the action, he might have induced the acceptor to pay the whole debt long before all the instalments were payable. Then *English* v. *Darley* (*a*) becomes a case expressly in point. There, the indorsee of a bill sued the indorser and acceptor, and took out execution against the acceptor, and received 100*l*. from him, and took his bond and warrant of attorney for payment of the remainder by instalments, with interest and costs, excepting only a nominal sum to enable him to maintain actions against the other parties. He then brought on to trial his action against the indorser. Lord *Eldon* thought that the bargain to give indulgence to the acceptor was a bar, and nonsuited the plaintiff; and on motion for a new trial, the Court was clear that the nonsuit was right; because giving time to the acceptor was a pledge that he should have time from all the other parties, and the holder had no right to give such pledge, and yet hold the other parties liable: the plaintiff having taking a new security from the acceptor, had discharged the debt.

Brougham and *Platt*, contrà. This case is not within the operation either of the case cited or of the rule of law, because, though the plaintiff did take the warrant of attorney, he did not thereby give time to the acceptor. The action had been commenced, but all the instalments would have been due long before the plaintiff could in the ordinary course have obtained a judgment in that action. The acceptor, therefore, received no indulgence, and the defendant has sustained no injury. It was proved that the defendant had due notice of the dishonour of the bill; and it was consequently his duty immediately to pay the amount to the holder. Then the circumstances of this case bring it within that of *Badnall* v. *Samuel* (*b*), which is an authority to shew that such an arrangement between the indorsee and the acceptor does not discharge the indorser. Independently, however, of this point, it is perfectly clear that this matter

(*a*) 2 Bos. and Pul. 61. (*b*) 3 Price, 521.

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of defence having arisen subsequently to the commencement of the action, could not properly be received in evidence under the general issue; and if so, there is no ground at all to impeach the plaintiff's right to a verdict.

The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J., who, after stating the facts of the case, thus proceeded. The jury found that the warrant of attorney was not given with the knowledge or consent of the defendant. The counsel for the plaintiff contended that as the warrant of attorney was not given till after the commencement of the suit, it was no answer to the action. We are all of that opinion. The question whether matter of defence arising after action brought, could be pleaded generally in bar of the action, was very fully discussed in the case of *Le Bret* v. *Papillon* (a). That case decided that no matter of defence arising after action brought can properly be pleaded in bar of the action generally, but ought to be pleaded in bar of the further maintenance of the suit: and it was founded upon the authority of *Evans* v. *Prosser*, where the two former cases, in which it had been held that actio non applied to the period of plea pleaded, were over-ruled. The matter of defence set up in this case did arise after the commencement of the action, and consequently, we are of opinion, upon the authority of the two cases which I have mentioned, that it could not be pleaded generally in bar of the action, and could not be given in evidence under the general issue. For these reasons our judgment is, that the rule to enter a verdict for the plaintiff must be made absolute.

Rule absolute.

(a) 4 East, 502.

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MORDY *v.* JONES.

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Where a vessel, having sailed from her port of lading with a cargo of goods, was obliged to put back in consequence of a peril of the sea, and it being discovered that part of the cargo, which was taken out, was damaged by sea water, could not be re-shipped without a delay of six weeks, the captain, in the exercise of a sound discretion, sold the damaged goods, and being unable to supply their place with others, sailed with the remainder, and arrived in safety:—Held, in an action on a policy on freight for the voyage, that the underwriters were not liable pro tanto for the loss of the freight of the goods so sold.

A RULE nisi had been obtained in this case for setting aside an award. It was an action upon a policy of insurance, dated 10th *February*, 1821, subscribed by the defendant for 250*l.* on the freight of the ship *Isabella* at and from *Kingston*, in *Jamaica*, to *Liverpool*. The facts of the case were thus set out in the award:—On the 1st of *February*, 1821, the vessel sailed from *Kingston* on the voyage insured, having on board a cargo of cotton, coffee, sugar, hides, and other goods, shipped by various persons for consignees in *England*, with bills of lading in the usual terms; but a plank having started in violent weather, the ship was obliged to put back to *Kingston*, when, after a survey, it was found necessary to land the whole of the cargo. This was, therefore, done, and the accident was repaired, but part of the cargo had been so wetted by sea water, in consequence of the starting of the plank, that it could not be re-shipped without danger, from ignition, to the ship and the rest of the cargo, unless it underwent a process of washing with fresh water, and then drying in the sun, which would have detained the vessel six weeks, and been attended with expense equal to the freight. Under these circumstances, the shippers of these goods refusing to interfere, but approving of a sale by the master, the master sold them, and finding he could not obtain other goods to complete his cargo in any reasonable time, and being pressed by the shippers of the rest of the cargo to proceed, he sailed for *Liverpool*, carrying with him the net proceeds of the damaged part of the cargo. On arrival at *Liverpool*, he paid over these proceeds to the parties interested, without retaining the freight of the goods sold. The master's proceedings at *Kingston* were such as a prudent man, uninsured, would have adopted. Upon these facts the arbitrator found that the plaintiff was entitled to recover for the loss of the freight of the goods sold.

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The question for the opinion of the Court was, whether the underwriter was liable, pro tanto, for the freight of the goods re-landed and sold as above mentioned.

In *Hilary* term the question was argued by *Parke*, for the plaintiff, and *F. Pollock*, for the defendant. The cases cited were *Mills* v. *Fletcher* (*a*) and *Green* v. *The Royal Exchange Assurance Company* (*b*).

The Court took time to consider of the case, and judgment was now delivered by

ABBOTT, C. J., who, after recapitulating the facts of the case, thus proceeded.—The question was, whether, under such circumstances, the underwriters could be held liable pro tanto for the loss of the freight of the goods thus landed and left behind. Though similar circumstances may frequently have occurred, it does not appear that there is any reported case to be found corresponding exactly with the present. Upon the whole, we are all of opinion that the underwriters cannot be held liable for this loss. It may be perfectly true that the most prudent course for the master to adopt, was to leave the goods on shore and sail without them; but it does not therefore follow that the underwriters should be compellable to make good the loss of freight incurred by those means. If we were to hold the underwriters answerable for a loss like this, we should be in effect affording a temptation to masters of vessels, on all similar occasions, to leave part of their cargo on shore, and sail without it, instead of waiting till the damage it had sustained was repaired; which would be pregnant with the most mischievous consequences. Great inconvenience would, in our opinion, result from laying down such a rule as would render underwriters liable in cases like the present. It may be both just and beneficial that the master should be at liberty to exercise his own discretion whether it is most

(*a*) Doug. 231. (*b*) 6 Taunt. 38; S. C. 1 Marsh, 447.

prudent to leave damaged goods behind, and sacrifice the value of their freight, or to wait till they can be restored to a removeable condition; but it by no means follows as a consequence that when, even in the soundest exercise of that discretion, he does leave the goods behind, and his owner thereby loses the freight of the goods pro tanto, that he should be privileged to throw the burthen of that loss upon the underwriters. This being, upon the whole, our opinion upon this case, it will follow that the rule obtained for setting aside the award must be made absolute.

Rule absolute.

PRATT v. HILLMAN.

Wednesday, June 22.

Where, in trespass for an act done in pursuance of the Building Act, 14 *G.* 3. c. 78. a verdict was found for the plaintiff, subject to a reference; and the arbitrator awarded a verdict for the defendant:—Held, that the defendant was entitled to treble costs under s. 100. of the statute, the same as if the plaintiff had been nonsuited, or a verdict had been found for the defendant, at the trial.

THIS was an action of trespass to recover damages for an alleged injury done to the house of the plaintiff, by means of a party-wall built up against it by the defendant. At the trial the plaintiff had a verdict, subject to a reference, and the arbitrator awarded that a verdict should be entered for the defendant, which award the Court, upon motion to set it aside, sustained (*a*). The defendant having afterwards obtained a rule calling on the plaintiff to shew cause why a suggestion should not be entered on the roll, that the action was brought for acts done in pursuance of the statute 14 *Geo.* 3. c. 78. (Building Act), and why the master should not tax the defendant his treble costs of the action, pursuant to section 100. of that statute,

F. Pollock now shewed cause, and contended that neither the words of the statute, nor the intention of the legislature, extended to cases where the matter in dispute between the parties was referred to arbitration, and where the arbitrator awarded that a verdict should be entered for the defendant. The word "verdict," made use of in the act, clearly meant

(*a*) Ante, vol. vi. 360.

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the verdict of a jury upon the merits, after a trial in open court, and not a verdict awarded by an arbitrator, after a reference of the matter in dispute, upon a mere informality arising out of an act of parliament. He submitted, therefore, that the defendant was entitled to his ordinary costs only, and that this rule ought to be discharged.

Coltman, contrà, insisted that the defendant was as much entitled to his treble costs in this case, as if the plaintiff had been nonsuited, or a verdict had been found for the defendant on the merits, at the trial. The words of the 100th section were as general as possible, and afforded no ground for the fanciful distinction relied on by the other side. That clause provided that no action shall be commenced against any person, for any thing done in pursuance of this act, until after twenty-one days' notice in writing, nor after the expiration of three months next after the fact committed, "and if the matter or thing appear to have been so done, or if it appear that such action was brought before the expiration of twenty-one days after notice, or was not commenced within the time limited, then the jury shall find for the defendant; and if a verdict be found for the defendant, or if the plaintiff become nonsuited, or discontinue or suffer a discontinuance, or if judgment be given for the defendant on demurrer, or by default or *otherwise*, then the defendant shall have judgment to recover treble costs of suit." The certificate of the arbitrator (*a*) clearly shewed that the defendant had acted bonâ fide in what he had done, therefore it was not too much to say that this was a verdict found for the defendant on the merits. But it was held in *Collins* v. *Poney* (*b*), which was a similar action to the present, that the defendant was entitled to his treble costs upon a nonsuit; and as the grounds upon which the arbitrator here awarded a verdict for the defendant, namely, the want of notice of action, and the action being brought after the time limited by the statute, would have been equally good grounds

(*a*) Vide ante, vol. vi. 360.

(*b*) 9 East, 322.

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for a nonsuit, it follows, upon that authority, that this defendant is entitled to his treble costs, and that this rule ought to be made absolute.

ABBOTT, C. J.—The words of the 100th section of the Building Act are as large and general as it was possible for the legislature to use, and clearly comprehend the present case. The evident object of the statute was, that wherever an action was brought for any act done in pursuance thereof, and the plaintiff failed in making out his right to sue, the defendant should be entitled to treble costs, and *that*, whether the plaintiff was nonsuited, or a verdict was found for the defendant. Then, that being the case, I can see no difference between a verdict found for the defendant in open court, and one awarded by an arbitrator after a reference made as this was. We have, therefore, no discretion upon the subject; the case comes within the act of parliament, and we are bound to see that it is put in force. The rule must be made absolute.

The other judges concurred.

Rule absolute.

BEVAN v. JONES, Esq.

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Declaration, for an escape, stated that the debtor was arrested, and gave bail; that bail above was put in *before a judge at chambers*, *prout patet per recordum*, and that the debtor surrendered in discharge of her bail, and afterwards escaped. The examined copy of the entry of the recognizance of bail stated it to have been taken *before the Court at Westminster*:—Held, first, that plaintiff was bound to prove the bail to have been taken as alleged, and, therefore, that the variance was fatal; and, second, that an entry in the filacer's book, stating the recognizance to have been taken *before a single judge*, was not admissible in evidence, and would not cure the objection, even if admitted.

CASE, against the Marshal of the King's Bench prison, for an escape on mesne process. The declaration stated that one *S. S.* heretofore, to wit, &c. was indebted to plaintiff in 200*l.* in respect of certain causes of action before then accrued to him; and being so indebted, plaintiff, for recovery of the debt, afterwards, to wit, &c. sued and prosecuted

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out of the Court of K. B. a special capias ad respondendum, directed to the sheriff of *Middlesex*, by which writ the sheriff was commanded to take the said *S. S.*, and her safely keep, so that he might have her body before our lord the king in fifteen days from the day of *Easter*, to answer plaintiff in a plea of trespass, on the case, upon certain promises therein mentioned, to the damage of plaintiff of 200*l.* as it was said, &c.; which said writ was duly marked and indorsed for bail for 129*l.* and upwards, and was delivered to the sheriff of *Middlesex* to be executed; that the sheriff arrested the said *S. S.* and detained her in custody for the cause aforesaid, and took bail for her appearance; that afterwards and while the said plea was pending in the said court of K. B., at the return of the said writ in the same *Easter* term, in the fifth year &c. before Sir *J. Bayley*, Knight, one of the justices of the said Court, &c. came *C. H.* and *W. M.* in their proper persons, and acknowledged themselves, and each of them did acknowledge himself, to owe to plaintiff 258*l.*, and then and there did consent for themselves, and each for himself and his heirs, that the said sum should be made of their lands and chattels, and levied to the use of plaintiff, upon the condition that if judgment should happen to be given in the said Court for plaintiff, against the said *S. S.* in the said plea, that then the said S. S. should pay and satisfy all such damages, &c. or render herself &c., *as by the record of the said recognizance, now remaining &c., more fully appears*; that on the 13th *May*, in the said *Easter* term, &c. the said *S. S.* surrendered herself in discharge of her said bail, at the suit of plaintiff, in the plea aforesaid, and was thereupon committed by Sir *C. Abbott*, Knight, &c. to the custody of the marshal &c., there to remain until &c., as by the record of the said surrender, now remaining &c., more fully appears. Averment that defendant, being the marshal &c., suffered the said *S. S.* to escape out of his custody, with the usual conclusion. Plea, not guilty, and issue thereon. At the trial before *Abbott*, C. J. at the adjourned *Middlesex* sittings

after last *Michaelmas* term, the plaintiff, having proved the issuing of the writ and the arrest, as stated in the declaration, produced an examined copy of the entry of the recognizance of bail, but which described the recognizance to have been taken before the Court at *Westminster*. It being thereupon objected that the allegation in the declaration that the recognizance of bail was taken before one of the judges at chambers, was not sustained, the plaintiff produced the filacer's book, which stated that the said *C. H.* and *W. M.* became bail above, and described the recognizance to have been taken before a single judge; and he further proved that where bail is taken before a judge at chambers, the entry usually describes the recognizance as taken before the Court. It being still, however, objected, that, in order to support his declaration, the plaintiff was bound to prove a recognizance of bail taken before Mr. Justice *Bayley* at chambers, the Lord Chief Justice reserved that point, and the plaintiff had a verdict.

Campbell, in *Hilary* term last, having obtained a rule nisi to enter a nonsuit, upon the point reserved,

Scarlett and *Chitty*, on a former day in this term, shewed cause. The mode in which the bail was given, was an immaterial circumstance; therefore a variance between the statement and the evidence upon that point, is unimportant, and furnishes no ground for entering a nonsuit. The mode in which the bail was given need not have been alleged at all; the only substantial and necessary allegations were, that bail was given, and that the party surrendered in discharge of her bail, and afterwards escaped. But the allegation was sufficiently proved; for, as the result was the same whether bail was put in before a judge at chambers or in court, the allegation that it was put in before a judge at chambers, was supported by the entry in the filacer's book, which stated it to have been put in before a single

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judge, and the production of a recognizance, stating it to have been so put in, was perfectly unnecessary. The statement of the particular place where bail was put in, was not matter of description; it was mere surplusage; therefore it was not necessary to prove it: *Wigley* v. *Jones* (*a*), *Purcell* v. *Macnamara* (*b*), *Phillipps* v. *Shaw* (*c*), and *Draper* v. *Garratt* (*d*). The circumstance that the recognizance of bail is pleaded with a prout patet per recordum will not aid the objection, for that reference is surplusage also, and it has been recently decided that such an averment does not compel the plaintiff to prove that which is surplusage: *Stoddart* v. *Pallmer* (*e*).

Campbell, contrà. It may be conceded that if the allegation in question can be rejected as surplusage, the present objection must fail; but it cannot be so rejected. It is necessary, in all actions against officers for escapes, to shew how the party came into custody, and the evidence of that fact was not complete in this case without proof of this allegation. *Purcell* v. *Macnamara*, *Phillipps* v. *Shaw*, and *Draper* v. *Garratt*, are all mainly distinguishable from this case, because in each of them the variance was merely as to the time when the judgment was obtained, the judgment itself not being described in the declaration. There are some cases pointed out by the statute 43 *Geo.* 3. c. 46. in which it is necessary that bail should be put in before a judge at chambers, and that the entry of the recognizance on the roll should describe it as having been so put in (*f*). Here, an entry of the recognizance of bail, describing it as having been put in before Mr. Justice *Bayley* at chambers, would have supported the averment in the declaration; but an entry of a recognizance of bail, taken before the Court at *Westminster*, does not. The allegation here was necessary;

(*a*) 5 East, 440.
(*b*) 9 East, 157.
(*c*) 4 B. & A. 435.
(*d*) Ante, vol. iii. 226.
(*e*) Ante, vol. iv. 624.
(*f*) Vide Tidd, 280, 8th ed.

but even if it was unnecessary, the plaintiff was bound to prove the fact correctly as alleged: *Webb* v. *Herne* (a) and *Turner* v. *Eyles* (b): and not having done so, the variance is fatal.

The Court took time to consider of their judgment, which was now delivered by

BAYLEY, J.—This case was argued some few days since, before my brother *Littledale* and myself only. It was an action against the marshal for an escape, and the declaration stated, that the plaintiff's debtor had been arrested, had given bail to the action, had surrendered herself in discharge of her bail, and had been committed to the custody of the marshal; that the bail came before me, at my chambers in *Serjeants' Inn*, and *there* entered into the necessary recognizance; concluding with an averment *prout patet per recordum*. In support of this statement the plaintiff, at the trial, produced the entry of the recognizance of bail, stating the bail to have been taken before me, in Court, at *Westminster*, and produced also the filacer's book, which stated the bail to have been taken before me, but did not state where; and he further produced parol evidence to shew, that where a recognizance of bail was taken before a judge at chambers, the entry usually described it as taken in Court. Upon a motion for a nonsuit, the question was, whether this evidence supported the declaration. We, who heard the argument, are of opinion that it did not. It was all along admitted that this was an essential part of the plaintiff's case; and properly so; because the validity of the debtor's commitment depended upon the allegation of bail having been put in, inasmuch as till bail had been put in, the debtor could not be surrendered in discharge of her bail, or be thereupon committed. But it was insisted that the allegation respecting the recognizance of bail was mere matter of inducement, and that the plaintiff might prove by

(a) 1 Bos. & Pul. 281. (b) 3 Bos. & Pul. 456.

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matter dehors the recognizance, that it was, in fact, taken before me at chambers, and that the customary course was to enter it as taken in Court; and *Purcell* v. *Macnamara*, *Phillipps* v. *Shaw*, and *Draper* v. *Garratt*, were relied on as in point. To those decisions we readily subscribe, but they do not govern this case, because in each of them the allegation out of which the variance arose was immaterial in itself, and formed no part of the cause of action. This is a very different case. Here the question whether there is or is not a proper recognizance, is material, and goes to the foundation of the plaintiff's cause of action, because that depends upon another question, whether the bail were put in before a competent tribunal. There is an important difference, in the result, between recognizances taken in Court, and those taken before a judge at chambers; for in the former case the scire facias must be in the county in which the Court sits; in the latter it may be in that, or in the county in which it is taken: for this *Hall* v. *Winckfield* (a) and *Kenny* v. *Thornton* (b) are authorities. In the cases relied on for the plaintiff, no new evidence was necessary; it was only that the evidence failed to support an immaterial averment: here new evidence was necessary, and was necessary for the purpose of making out an essential and indispensable fact. It was held in *Shuttle* v. *Wood* (c) that a recognizance of bail in K. B. is not a record until entered; but it was also held in *Hall* v. *Winckfield* that when entered it becomes a recognizance from the first acknowledgment, and is binding from that time, as a record, both upon person and lands. If so, the only evidence of it is the record, and evidence dehors a record cannot be resorted to even to prove it, much less to contradict it; but if the filacer's book were admissible, such evidence would be let in, and that would require again to be explained by parol evidence; and the result would be, that the recognizance would be proved in part by parol evidence. *Shuttle*

(a) Hob. 195. (b) 2 Sir W. Bl. 768. (c) Salk. 564.

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v. *Wood* (*a*) was the exact converse of the present case, and the variance was there held fatal. That was debt on recognizance, alleged to have been taken "in curia dictæ Dominæ Reginæ de banco coram *Thoma Trevor*, Mil. et sociis suis. The defendant pleaded nul tiel record. The recognizance certified appeared to be taken before Mr. Justice *Nevil*, at his chambers. Et per tot. Cur. The plaintiff hath failed of his record, and hath varied in his description from the recognizance." The only difference between that case and the present is, that there the recognizance was the gist of the action, and here it was not, but matter of inducement only; but, still, it was an essential allegation here, and such as required proof: that proof could be given only by producing the entry of the record, and that not being produced, there was a failure of proof, and the plaintiff ought to have been nonsuited. The rule for entering a nonsuit, therefore, must be made absolute.

Rule absolute.

(*a*) Salk. 564; id. 659; 6 Mod. 42. S. C.

PICKERING *v.* The BISHOP of CHESTER.

Wednesday, June 22.

This Court will not grant a certiorari to remove proceedings in quare impedit from the court of Great Session at *Chester* into this Court, where a special verdict is expected to be found; the proper course is to remove the special verdict, when found, into this Court by writ of error.

THE plaintiff in this case had obtained a rule nisi for a writ of certiorari to remove the proceedings, which were by quare impedit, from the Court of Great Session at *Chester* into this Court, upon an affidavit, stating that the plaintiff's case depended upon the construction of two acts of parliament, and therefore that questions of law must arise upon the trial; that the defendant had pleaded several very special pleas, which raised questions upon the construction of several deeds; that in all probability a special verdict would be found; and that the application was not made for delay.

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Cross, Serjt. and *J. Williams* now shewed cause, and contended that the rule must be discharged on two grounds. First, that this being a real action, actually pending in a court which was of itself a superior court, and of competent jurisdiction to try the cause and all matters of law arising in it, this Court had no jurisdiction to remove the proceedings by writ of certiorari; and second, that as it was likely that a special verdict would be found, the regular and proper course was to wait till that verdict had been found, and then to remove the special verdict into this Court by writ of error. They cited, on the first point, *Gilb. Exec.* 201, 2. and *Williams* v. *Thomas* (a), and on the second, *Fox* v. *The Bishop of Chester* (b).

G. Marriott, contrà. The application was made under the authority of the new *Welch* Judicature Act, 5 *Geo.* 4. c. 150., under which it is plain that this Court has jurisdiction to remove the proceedings in this case by certiorari. The preliminaries required by that act have all been performed, and therefore the course adopted is perfectly regular. Unless, therefore, the Court are of opinion that the grounds set forth in the plaintiff's affidavit are insufficient to warrant the application, they will not hesitate to make this rule absolute.

Abbott, C. J.—I am of opinion that the grounds set forth in the plaintiff's affidavit are insufficient to warrant his present application; and I think the best course will be for him to await the finding of the special verdict, and then to remove it into this Court in the regular way, by writ of error, by which means all questions of law arising in the case may be fully discussed and properly decided. Such a course will certainly be for the interest of both parties, for if we were to grant the writ of certiorari, all the proceedings would be removed, and all the costs already incurred must be incurred a second time, for the plaintiff would have

(a) Doug. 750. (n. 2.) (b) 4 D. & R. 93.

to declare de novo (*a*). It seems to me, therefore, that we are doing the best for the plaintiff by discharging this rule.

The other judges concurred.

Rule discharged.

(*a*) See Tidd, 424. et seq. 8th ed.

TAYLOR *v.* BUCHANAN.

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An insolvent may maintain an action for goods sold by him after the hearing of his petition to the Insolvent Debtor's Court, and while he was in custody under their order; but the balance of a debt inadequately described by him in his schedule, may be set off in such an action: for the discharge relieves him only from such specific debts as he describes in his schedule.

THIS was an action of debt for goods sold and delivered. Pleas, first, nil debet; and second, a set-off. At the trial before *Littledale*, J. at the adjourned sittings after *Michaelmas* term, 1824, the plaintiff, in the first instance, proved a claim for 8*l.* 5*s.* for oats sold and delivered to the defendant on the 31st *May*, 1823. The defendant then proved a set-off of 44*l.* 18*s.* 11*d.* for medicines furnished to the plaintiff. The plaintiff, in reply, produced his discharge by the Insolvent Debtor's Court, from which it appeared that his petition was heard on the 10th *March*, 1823, and that the Court had adjudged him to be forthwith discharged as to all the debts specified in his schedule, except one debt of 78*l.*, fraudulently contracted with one *C. M.*, in respect of which they adjudged him to be detained in prison for nine months; but upon examining the schedule exhibited by the plaintiff in the Insolvent Debtor's Court, it appeared that he had described the defendant's demand as amounting to only 8*l.* 0*s.* 8*d.*, instead of 44*l.* 18*s.* 11*d.*, the amount now proved. Two objections were taken on the part of the defendant. First, that the plaintiff, having been in custody under the order of the Insolvent Debtor's Court at the date of the supposed sale to the defendant, was not then competent to contract, and therefore could not now sue upon any contract so made; and second, that his discharge could extend no further than the amount specified in his schedule,

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and, as the difference between the sum of 8*l.* 0*s.* 8*d.* there specified, and the sum of 44*l.* 18*s.* 11*d.* now proved, exceeded the sum for which the action was brought, the plaintiff must be nonsuited. The learned judge declined to nonsuit, and the plaintiff obtained a verdict for 8*l.* 5*s.*, the defendant having leave to move to enter a nonsuit.

D. F. Jones moved accordingly, and renewed both objections. With respect to the first, he contended, this was not like the case of *Chippendale* v. *Tomlinson* (*a*), where it was held that a bankrupt might maintain assumpsit for work and labour done pending the commission for the support of himself and his family, because the assignees had no title to the profits of his personal labour; this was an action for goods sold and delivered while the plaintiff was in custody, when he had no power to contract, and when the whole of his property had vested in and belonged to the assignees under the Insolvent Debtor's Act. The Court refused the rule upon this point, referring to the case of *Kitchen* v. *Bartsch* (*b*), and stating that as the assignees had not interfered, it was not competent for the defendant to raise such an objection. Upon the other point, they granted a rule nisi, against which

Hutchinson, (with whom was *Scarlett*,) shewed cause. He contended that the discharge of the Insolvent Debtor's Court was not confined to the precise sums specified in the schedule, but operated as a complete extinguishment of every demand. The operation of the insolvent acts, as against the insolvent, was to take from him the whole of his property, and divide it among his creditors; and their operation in his favour was clearly intended to be, that he should be thereby discharged from all the claims of all the creditors named in his schedule. The insolvent acts provided against such creditors being taken by surprise, by directing notice of the proceedings to be given them, and

(*a*) 2 Mont. B. L. 542. Vide 2 Str. 1207. 1 Atk. 253. (*b*) 7 East, 53.

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when they received such notice, it was their own fault if they did not examine into the correctness of the insolvent's schedule, and if they found their debts inaccurately described, compel him to amend it. That they were expressly authorized to do by the statute 1 *Geo.* 4. c. 119. s. 16, by which any opposing creditor was empowered to require it to be referred to the proper officer of the Insolvent Court to examine into the truth of the schedule, and to report thereon to the Court; and it was clear that such an examination might be followed up by an amendment, if necessary, because else the clause would be altogether nugatory. The object of the legislature was, upon certain conditions, to give the insolvent an absolute and complete discharge, and that object would be wholly defeated, and great hardship imposed upon the insolvent, if he could at any future time be held liable for any accidental difference between the sums specified in his schedule, and the sums which might afterwards be claimed by his creditors.

D. F. Jones, contrà, insisted, that the hardship, if any, bore upon the creditor, and not upon the insolvent, inasmuch as the insolvent had the power to prevent all difficulty and mistake, but the creditor had none. The insolvent acts meant the discharge to apply to such sums only as were specified in the schedule; that was their object, and it was apparent throughout every one of them. What were the provisions of the 1 *Geo.* 4. c. 119? Section 4, directed that the *petition* should state the amount of the debts; section 6. that the *schedule* should specify the amount of the debts and claims, distinguishing between admitted and disputed items; section 7, that the *dividend* should be made according to the amount of the debts expressed in the schedule; section 16, that the *discharge* should specify the amount of the debts to which it was to apply; and section 25, that the *judgment* should be entered up for the amount of the debts remaining unpaid at the time of the discharge. All these combined to shew that the power of the Insolvent

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Court was confined to the sums expressed in the schedule. It was the duty of the insolvent to insert the full and true amount of the creditor's claim, and he might do it without prejudice, because where he doubted the validity of the claim, he might enter the sum as a disputed item. The notice to the creditor did not specify any sum, and therefore imposed no duty upon him to investigate the schedule, and even if it did, he would obtain no remedy, for the act gave him no power to examine the items in the schedule, or to set them right, where they were wrong, nor, even if he made the attempt, could the Court assist him in it. Section 16, did indeed empower an opposing creditor to prevent collusion between the insolvent and any other particular creditor, by examining into the validity of the claims admitted in the schedule, but gave him no power to increase the amount of his own debt, as specified in the schedule, nor did it give the Court any power to adjudicate upon any such question.

The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J., who, after recapitulating the facts of the case, thus proceeded. After hearing this case argued at bar, there was one point upon which the Court took time to consider, namely, whether the insolvent's discharge extended to the whole of the debt proved against him at the trial, or to so much of it only as was specified in his schedule. If it extended to the whole debt, the plaintiff was entitled to recover, because then the debt which constituted the set-off was extinguished; but if it extended only to the sum of 8*l.* 0*s.* 8*d.*, specified in the schedule, there remained an unanswered set-off of 36*l.* and upwards, and as that exceeded the sum for which the action was brought, the plaintiff ought to have been nonsuited. Now, by section 4, of the 1 *Geo.* 4. c. 119, the prisoner is to petition for his discharge; and in his petition he is to state, among other things, the amount of the debts for which he is detained;

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and to pray to be discharged from custody, and to have future liberty of his person against the demands for which he is in custody, and against the demands of all other persons who shall claim to be his creditors; and is, at the time of subscribing the petition, to execute a conveyance and assignment of his estate and effects, in such form as the Court shall direct, to the provisional assignee of the Court. By section 6, the prisoner shall, within a time thereby limited, "deliver into the said Court a schedule, containing a full and true description of all and every person and persons to whom such prisoner shall be then indebted, or who, to his knowledge or belief, shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner." By section 7, when the Court shall adjudge a prisoner to be entitled to his discharge, they shall appoint assignees of his estate and effects for the purpose of that act; and if it shall appear that such assignees have in their hands any balance wherewith a dividend may be made among the creditors of the prisoner, whose debts are expressed in the schedule, such assignees shall forthwith declare the amount of the balance in their hands, wherewith such dividend may be made; and every creditor whose debts shall be stated as *admitted* in the prisoner's schedule shall be allowed to receive a share of such dividend, unless such prisoner, or his assignees, or any other creditor of such prisoner, shall object to any such debt, in which case the same shall be examined into by the said Court, who shall have full power for that purpose to take all measures necessary for the due investigation of such claim; and the decision of the said Court upon such claim shall be conclusive with respect to the dividend. By section 16, the Court shall cause notice to be given to the creditors, and to be inserted in the *London* Gazette, and shall appoint a day and place for hearing the matter of the petition; it shall be lawful for any creditor, after notice, to oppose the prisoner's discharge; on the hearing, the Court

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may, if they deem it necessary, order that it shall be referred to an officer of the Court to investigate the accounts of the prisoner, and to examine into the truth of the schedule, and to report thereon to the Court; and the Court may proceed on the other matters in opposition to the prisoner's discharge; and in case the prisoner shall not be opposed, and the Court shall be satisfied with the schedule, and that the prisoner is entitled to the benefit of the act, then the Court shall so declare, and shall order the prisoner to be discharged from custody, and shall in such order specify the several debts of the prisoner to which such discharge shall apply. By the subsequent statute of 3 *Geo.* 4. c. 123. s. 5, the Court shall have the same power to examine all the debts specified in the schedule, whether admitted or disputed, as they had by section 16 of the former statute as to admitted debts only. By section 6, it shall not be necessary for the Court in their adjudication, or in their order of discharge, to specify the creditors, as required by the former statute; but it shall be sufficient to refer in the order to the schedule, specifying those creditors with respect to whom the prisoner is to be entitled to the benefit of the act. These are the only variations between the two statutes bearing upon the present case, and it is evident, therefore, that the whole course of proceeding under both statutes has reference to the schedule; and the schedule appears to be made, in each, the only guide by which to determine what are the debts from which the prisoner is to be discharged. If the discharge could extend to debts not specified in the schedule, it would become necessary to inquire into the validity of every such debt, the period when it was contracted, and many other circumstances, all of which ought to be inquired into by the Insolvent Debtor's Court, before they could properly pronounce a prisoner entitled to his discharge; otherwise a prisoner might relieve himself from such debts without any inquiry at all, without passing through the ordeal of the Court, and without subjecting himself to that punishment which the Court are authorized to inflict

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upon fraudulent insolvents. It may be a hardship upon a creditor whose debt is not fully set out in the schedule, that he cannot have the benefit of a dividend upon his full debt, because, as the whole of the insolvent's property is given up to the assignee, such a creditor cannot derive any real advantage from bringing an action for the difference. Whether the Insolvent Debtor's Court have, or have not, power, upon investigation of the prisoner's accounts, to order the debt to be increased, it is not necessary to decide; but if not, the hardship to which I have alluded will not be likely to occur very frequently, because as the prisoner is not discharged from the whole of a debt, unless he specifies the whole of it in his schedule, it will be strongly for his interest to take care that his schedule does really contain the full amount of his debts. Upon the whole, therefore, we are of opinion that the debt of 36*l.* 18*s.* 3*d.*, being the difference between the whole debt claimed, and the smaller debt inserted in the schedule, remained an existing debt notwithstanding the plaintiff's discharge, and might be set off against his claim; and, that as that set-off exceeds in amount the sum claimed by the plaintiff, he was not entitled to maintain this action, and the rule for entering a nonsuit ought to be made absolute.

Rule absolute.

PALMER and another *v.* FORSYTHE and BELL.

Wednesday, June 22.

Habeas corpus cum causâ does not lie to remove proceedings from an inferior court into this Court, unless it appears that the defendant is actually or virtually in custody.

The return to a writ of certiorari to remove proceedings from an inferior court into this Court, setting out a copy of the record, but not returning the record itself, is irregular, and the Court quashed the writ on motion.

TWO rules had been obtained in this case, the one to quash a writ of habeas corpus cum causâ, and the other to quash a writ of certiorari and return, and for a procedendo. The affidavits disclosed these facts: an attachment in the following form, at the suit of the plaintiffs, issued out of the Court of

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Pleas at *Berwick*, directed to the serjeants at mace of that court: "Arrest the goods of *T. Forsythe* and *T. Bell*, in an action upon the case, at the suit of *Palmer* and another to their damage 200*l.* Take good bail for 162*l.* 2*s.* 6*d.*" Bail was taken in the following form: "In the Court of Pleas, *Berwick, Palmer* and another, plaintiffs, and *Forsythe* and *Bell* defendants. Bail for the defendants, *A. B.* and *C. D.*" On the 13th of *April* a writ of habeas corpus cum causâ issued, in the return to which the attachment and the bail-piece were set out, and it was stated that a plaint was entered at the next court after the bail, and that the defendants had in no other manner been in custody. On the 20th of *April*, which was previous to the return of the writ of habeas corpus, a writ of certiorari issued, commanding the mayor, &c. of *Berwick* to send into this Court, "the plaint, with all things touching the same, fully and entirely as it remains in Court." In the return to this writ the attachment, the bail-piece, and the plaint were set out, and it was stated that, "the said precept, action, bail-piece and plaint, are still remaining in the said Court undetermined, and this is the tenor of the record and process of the said plaint." The practice of the Court of Pleas at *Berwick* is, that when goods have been attached and bail given, the goods are returned to the defendant, and not to the bail; no appearance is entered for the defendant, and upon final judgment being obtained, execution issues against the goods of the defendant, and the persons of the bail, but not against the person of the defendant, for over that the bail have no power: and when the goods have once been attached, the defendant cannot release them by surrendering himself to prison.

Archbold shewed cause against both rules. There is no ground for quashing the writ of habeas corpus, because as the bail-piece shews that bail has been put in for the defendant, he was by construction of law in custody, and the proper method of removing the cause was by a writ of

habeas corpus. [*Abbott*, C. J. The goods were released as soon as bail was given, and the bail had no power over the persons of the defendants; it is impossible, therefore, to say that the defendants were either virtually or actually in custody: and if so, the habeas corpus does not lie. That was expressly decided in the late case of *Mitchell* v *Mitchinham* (a)]. Then the writ of certiorari must be the proper course, and a procedendo certainly cannot be awarded, because the record having been once removed into this Court, cannot be sent back again into the inferior court.

G. R. Cross, contrà. It appears from the affidavits that the writ of certiorari issued before the return of the writ of habeas corpus. That is a manifest irregularity, and even upon that ground the writ of certiorari must be quashed. But independently of that, the return itself is irregular, for it returns not the record itself, but only copies of the proceedings. Both these rules, therefore, must be made absolute.

ABBOTT, C. J.—I think we must make both these rules absolute. With respect to the writ of habeas corpus, the case I have already alluded to is decisive, and with respect to the writ of certiorari the informality of the return is fatal. It does not return the record itself, but only a copy of it, the argument, therefore, that a record once removed into this Court cannot be sent back to the court below, does not apply, because in reality this record has not been removed. Both writs therefore are irregular, and both must be quashed, and a procedendo be awarded.

The other judges concurred.

Rule absolute.

(a) Ante, vol. ii. 722.



BROMFIELD *v.* W. JONES, Esq.

In an action against the marshal for an escape, averring the judgment and award of execution against the prisoner for the damages recovered against him; "and *thereupon*," on such a day, the prisoner was committed to the custody of the marshal, and escaped, it is unnecessary to prove that a scire facias had been sued out upon the judgment, the allegation being immaterial.

THIS was an action against the marshal of the King's Bench prison, for the escape of one *Hale Wortham*, alias *White*. The declaration stated that in *Easter* term, 5 *Geo.* 4, the plaintiff recovered in the King's Bench against *H. Wortham*, alias *White*, the sum of 79*l.* as by the record and proceedings thereof, still remaining in the said Court, appeared; that afterwards, in *Trinity* term, in the fifth year aforesaid, such proceedings were had in the said Court, that it was considered by the same Court that the plaintiff should have his execution against the said *H. Wortham* for the damages aforesaid, according to the force, form, and effect of the said recovery, by default of the said *H. Wortham*, as by the record of the said last mentioned proceedings, still remaining in the said Court of our lord the King, more fully and at large appears; and *thereupon*, on *Wednesday* next after three weeks of the *Holy Trinity*, in *Trinity* term, in the fifth year aforesaid, the said *H. Wortham* was committed to the custody of the said defendant, then being marshal of the King's Bench prison, *in execution* for the damages aforesaid, there to remain until he should satisfy the said plaintiff the said damages; but that the defendant, not regarding the duty of his said office as marshal, suffered the said *H. Wortham* to escape. Plea, the general issue. At the trial before *Abbott*, C. J. at the *Middlesex* adjourned sittings after last *Michaelmas* term, it appeared that the defendant *Wortham* had surrendered in discharge of his bail, and was finally charged in execution upon an interlocutory judgment, and afterwards escaped. The original judgment and commitment were proved, but there was no proof of any judgment in *scire facias*. On the part of the defendant it was objected that it was necessary to prove a judgment in *sci. fa.* in order to sustain the averment in the declaration, that execution had been awarded by the Court of King's Bench

against *Wortham*, especially as there was a positive allegation that *Wortham* was *thereupon* committed. The Lord Chief Justice said he would save the point, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

In *Hilary* term, *Gurney* having obtained a rule nisi accordingly,

Denman, C.S. and *Chitty* now shewed cause. The only question is, whether the plaintiff has proved enough of the averments in the declaration to sustain his cause of action. A plaintiff is not bound to prove immaterial allegations. The cause of action here does not depend upon whether a scire facias had issued upon the judgment, but whether the prisoner had been in fact committed to the custody of the marshal. Now this was clearly proved. The proceedings against *Wortham* are truly described, by averring that in fact the party was committed to the custody of the defendant. The allegation following the description of the original judgment may be rejected as surplusage, and still there is a sufficient cause of action averred, because the writ of execution is stated to have been founded on the original judgment. The word "thereupon" does not, of necessity, import that there had been a scire facias, and if not, then proof of such a writ having issued was unnecessary. They cited *Wigley* v. *Jones* (a).

Gurney and *Campbell*, in support of the rule. The question here is, not whether the averment of a sci. fa. having issued is material or not, but whether the plaintiff can aver that which never had existence. The averment "and *thereupon* &c. the said *H. Wortham* was committed to the custody of the marshal," is, in substance and effect, a reference to a *sci. fa.*, which not being proved, the plaintiff failed in substantiating what he assumed to be a material allegation.

(a) 5 East, 440.

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There is no doubt that for some purposes a scire facias is a new action, and a judgment of the Court is given upon it. For instance, suppose a declaration avers a judgment in the King's Bench, and that it had been affirmed on error in the Exchequer Chamber, and that thereupon a capias ad satisfaciendum had issued, there is no doubt it would be necessary to prove the judgment in the Exchequer Chamber. It is laid down in *Rol. Abr.* tit. *Execution*, 2. *Trinity*, 13 *Car.* 1. that if the plaintiff, within a year after judgment, sue out a scire facias, he cannot have a capias afterwards, within the year, until he has a new judgment in the scire facias. This shews that the capias ad satisfaciendum must be founded on the scire facias. For the same reason the committitur must be founded on a sci. fa., and therefore the allegation that *Wortham* was committed was not properly proved, the sci. fa. not having been produced. The cases of *Webb* v. *Herne* (a) and *Turner* v. *Eyles* (b) are, in principle, strongly in support of this argument. In the former, which was an action against the sheriff for an escape, it was alleged in the declaration that *J. S.* was arrested "under a writ indorsed for bail, by virtue of an affidavit now on record," and the Court held that the plaintiff was bound to produce the affidavit in evidence, though the latter part of the averment was unnecessary: and in the latter, the declaration having averred that the prisoner was brought before the judge, and by him committed to the custody of the marshal "as by a writ of habeas corpus, and the commitment thereon remaining of record appeared," and it appearing that the commitment given in evidence was the commitment by a judge of the King's Bench, *not of record*, the Court held the averment to have failed in evidence. On these authorities it is clear, that by the plaintiff's mode of pleading he has put the existence of the sci. fa. in issue, and having failed to prove it, the action cannot be maintained.

BAYLEY, J.—It is a general rule that a party is not

(a) 1 B. & P. 281. (b) 3 Id. 456.

bound to prove an immaterial allegation, merely because he has averred it, unless by his mode of pleading he makes some of his material allegations depend upon it. If, from the form of the declaration, you can strike out that part which is unnecessarily alleged, and still the declaration will in all its parts be good, and you prove what is material, the action may be supported. That was distinctly laid down by *Buller*, J. in *Peppin* v. *Solomons* (*a*), and he refers to the case of *Savage* v. *Smith* (*b*), which was an action of debt against an officer, for extorting illegal fees. The declaration there stated that *R. T.* in *Trinity* term, 15 *Geo.* 3. recovered against *J. M.* 51*l.* 12*s.*, which judgment being in force, the said *R. T.* sued out a fieri facias upon the *said* judgment, to levy the debt, &c.; that the writ was delivered to the sheriff, who made his warrant to the defendant to levy; that he levied the debt besides poundage, and exacted from *J. M.* 1*l.* 1*s.* more. Now, in that case the judgment was unnecessarily stated, but having unfortunately stated the writ of execution, and connected it with the judgment, it was held that the plaintiff was bound to prove the judgment. In commenting on that case, *Buller*, J. says, "I admit it was not necessary for the plaintiff to state the judgment, but as the plaintiff alleged that the party recovered a judgment, and that he sued out a writ of execution upon the *said* judgment, the execution was necessarily tied down by that judgment; and therefore the judgment was made material by the subsequent words which were introduced. So in an action for words, where a long introduction is unnecessarily inserted in the declaration, if the charge be tied up to that introduction, the latter must be proved, because the material part is thus made to depend on the immaterial part of the declaration." With that rule of construction before us, let us look at the present declaration. It states that in *Easter* term, 5 *Geo.* 4, there was a judgment recovered, and that in *Trinity* term, in the same year, there was an award

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(*a*) 5 T. R. 496. (*b*) 2 Sir W. Bl. 1101.

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of execution by the Court; and *thereupon* a commitment of the defendant to the custody of the marshal. These averments were all proved, but there was no proof that there was any judgment in scire facias, as the allegation imports there was. Now that averment was wholly unnecessary, because you do not want a scire facias to give you a right to charge in execution, if a year and a day have not expired. Here no such interval had elapsed, and therefore a sci. fa. would have been an unnecessary writ. No material allegation in this declaration is made to depend upon that averment; for merely stating a judgment, and that the party was afterwards charged in execution, is a sufficient cause of action to establish in evidence. But it is contended that the use of the phrase "thereupon," has the effect of tying up the judgment and the award of execution upon the scire facias, so as to render it necessary to give evidence of that proceeding. I, however, think that such is not the effect of that word. The word "thereupon" is rather introduced as a particle of progression, shewing the course of the process. The declaration states the judgment and award of execution, and thereupon a commitment in execution for the damages aforesaid, that is, the damages mentioned in the judgment. If the damages in the award of execution had been different from those stated in the judgment, then, undoubtedly, that would have been a fatal variance; but that is not so. Then, as every material allegation has been proved, the plaintiff is entitled to recover.

HOLROYD, J.—I am of the same opinion. I think this case is quite distinguishable from all the cases of variance hitherto decided. All the material allegations in the declaration were proved; namely, the original judgment and the commitment in execution thereon. The words that the party was "thereupon committed," amount only to an allegation of fact, and not a description of the record upon which the commitment took place, and consequently it was unnecessary to prove a scire facias.

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LITTLEDALE, J.—I am of the same opinion. It is not necessary to sue out a sci. fa. if the execution is taken out within a year and a day after judgment; but assuming it not to have been taken out till after that period had expired, it would be unnecessary to state, in the award of execution, that the judgment was revived by sci. fa. The Court will not allow a plaintiff to sue out execution unless he comes within a reasonable time. The statute of *Westminster* says he must have it within a year and a day; but even if he sues it out after that time without a sci. fa., still that would be only an irregularity in practice, for which the remedy is by summary application to the Court. A matter of irregularity would not vary the obligation of the marshal to keep his prisoner in custody, even though execution had been taken out after the lapse of a year and a day, without a sci. fa. If a sci. fa. was unnecessary, it would be equally unnecessary to recite the judgment thereon, and the award of execution upon it; and supposing the plaintiff had unnecessarily recited it, the declaration might have been referred to the master to strike it out for superfluity. Here all the necessary allegations have been made and proved, and consequently the plaintiff was not bound to prove immaterial matters.

Rule discharged.

HARTLEY v. R. J. CASE the younger.

Notice to the drawer, of the dishonor of a bill of exchange must contain a statement that the bill has been in fact presented and dishonored; otherwise it is insufficient.

ASSUMPSIT upon a bill of exchange, dated 13th *April*, 1824, drawn by the defendant upon and accepted by *R. J. Case* the elder, for 150*l.*, payable four months after date, and indorsed by the defendant to the plaintiff. Plea, non assumpsit. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Michaelmas* term, it appeared that the bill was made payable at a banker's, and on the

Quære, whether notice to drawer, on the same day the bill has been once presented and dishonored, is premature?

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16th *August*, 1824, it was presented for payment at eleven o'clock in the forenoon, when the answer given at the banker's was, "no effects." On the same day the plaintiff sent a letter to the defendant in the following terms:—"I am desired to apply to you for the payment of the sum of 150*l.* due to myself on a draft drawn by Mr. *Case*, on Mr. *Case*, which I hope you will, on receipt, discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." The question was, whether this was a sufficient notice to the defendant of dishonor, as drawer of the bill. It was objected, on the part of the defendant, that it was nothing more than a demand of payment, and not such a notice of dishonor as the law required, so as to bind the drawer of a bill of exchange. The Lord Chief Justice yielded to the objection, and directed a nonsuit. *Holt* having in *Hilary* term obtained a rule nisi for setting the nonsuit aside, on the authority of *Burbridge* v. *Manners* (*a*),

Brougham and *Manning* now shewed cause. First, assuming the letter given in evidence to be a sufficient notice of dishonor, still it was premature, because the acceptor had the whole of the 16th *August* to pay it in; but, second, it is not in fact a notice that the bill in question has been dishonored by the acceptor. The nisi prius case of *Burbridge* v. *Manners* is an authority rather in favour of than against the objection, for although it was there held by Lord *Ellenborough* that notice of the dishonor of a bill of exchange, or promissory note, may be given the same day it becomes due, as soon as the acceptor or maker has refused payment, yet the fact was there clearly established that the maker of the note had actually refused payment before the notice of dishonor was given. Now here there was no actual refusal of the acceptor to pay the bill on the day it became due. It is true it was presented at an early hour at the banking-house where it was made payable, but

(*a*) 3 Campb. 193.

as the acceptor had the whole day to take it up, the notice of dishonor could not properly be given until next day. But, at all events, the letter in question was too ambiguous to have the effect of a notice of dishonor. All notices, whether of dishonor or of non-acceptance, should be clear, plain, and intelligible. At the utmost this is only argumentative or inferential. It is no more than an attorney's letter, demanding payment of a draft drawn by Mr. *Case* upon Mr. *Case*. But this conveys no positive intimation to the defendant that the bill in question has been dishonored. For any thing that appears to the contrary, the letter may have been written even before the bill was presented.

Scarlett, *Holt* and *Chitty*, contrà. It is submitted that this was sufficient notice to the defendant of the dishonor of the bill. *Burbridge* v. *Manners* decides that notice of dishonor may be given the same day the bill becomes due, as soon as the acceptor has refused payment. Now here, the bill being made payable at a banker's, it is presented about eleven o'clock, and the answer is "no effects." It was then competent to the plaintiff to give immediate notice to the drawer. There is no case which decides that the holder of a bill is bound to wait till the next day before he gives notice to the drawer, if the bill is not paid when presented. It is laid down by *Buller*, J. in *Leftley* v. *Mills* (a), that "a protest must be made on the last day of grace: now that supposes a default in payment, for a protest cannot exist unless default be made. But if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day." Then, as to the form of the notice, it is sufficient. The law does not require any particular technical form of notice. The object of notice is, that the party who draws the bill may be put upon his guard, in order to adopt measures for the purpose of saving his money in the hands of the acceptor. With this view, the notice in question was abundantly explicit. It advises

(a) 4 T. R. 174.

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the defendant of the amount of the bill, and of the names of the parties to it. [*Abbott,* C. J. Suppose the bill had not been accepted?] Still it is sufficient to convey to the defendant information that the particular bill for 150*l.* has been dishonored; and however equivocal or ambiguous the terms may be, it informs him that it is a draft by Mr. *Case* on Mr. *Case*. [*Bayley,* J. If any demand of payment from the acceptor be sufficient, should you not tell the defendant, in terms, that there has been a demand, and non-payment?] Notices of this description are not to be construed too strictly, but ought to be construed liberally, in favour of mercantile instruments.

ABBOTT, C. J.—No precise form of words is necessary in a notice of the dishonor of a bill of exchange or promissory note; but I take it that notice to the drawer of a bill, if dishonored, must convey definite information to the drawer, what the nature of the bill is, and the fact that it has been dishonored by the acceptor. The letter in question does not convey one or the other. It does not say what the bill is, by whom drawn, when due, or when drawn, or that it has been presented and dishonored.

BAYLEY, J.—The general rule is, that you are to give notice to the drawer the day after the bill becomes due, and has been presented and dishonored; but whether a notice on the day the bill becomes due, be or be not premature, it is not essential to decide in this case, because here the notice does not even inform the drawer that the bill has been presented.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule discharged.

BERDOE v. BLOOMFIELD.

A writ of error does not stay execution, unless the defendant suggests that there is real ground of error, where it appears that after action brought the defendant threatened to bring a writ of error, and ruin the plaintiff by law proceedings, unless he complied with certain terms.

ON shewing cause against a rule for taking out execution, notwithstanding the allowance of a writ of error, it appeared on affidavit, that after action brought, the defendant had called on the plaintiff, and offered to pay him a certain sum of money in satisfaction of his demand, but short of the amount for which the action was brought; and upon plaintiff refusing to accept the terms proposed, the defendant threatened that he would bring a writ of error in the action, and would ruin the plaintiff by law proceedings. The point was whether, under these circumstances, the defendant was bound to shew some reasonable grounds for bringing a writ of error, in stay of execution.

After hearing *Bingham* for the plaintiff, and *F. Kelly* for the defendant,

BAYLEY, J. said—Where a party distinctly says he will bring a writ of error for delay, it is very proper when he has brought the writ of error, and application is made to set it aside, that he should be put to the test, whether it is really brought for the purpose of delay, or whether there is real ground of error. Here, no ground of error is suggested, and therefore I think this rule must be absolute.

LITTLEDALE, J. (*a*) concurred.

Rule absolute (*b*).

(*a*) *Abbott*, C. J. and *Holroyd*, J. were absent.

(*b*) Vide *Pool* v. *Charnock*, 3 T. R. 79; *Redford* v. *Garrod*, 1 J. B. Moore, 253; S. C. 7 Taunt.; and *Mee* v. *Hopkins*, ante, vol. ii. 208.

SMITH, Gent. one, &c. *v.* WATTLEWORTH.

An agent appointed to practise in the Insolvent Debtors' Court, if he be an attorney of any of the superior courts of record, cannot recover his bill of costs for business done in procuring the discharge of an insolvent debtor, without delivering his bill one month before action brought, pursuant to the provisions of 2 *G.* 2. c. 23. s. 23.

THIS was an action by an attorney of this Court, to recover the amount of his bill of costs and charges in procuring the defendant's discharge under the Insolvent Debtors' Act, 1 *Geo.* 4. c. 119. Plea, non-assumpsit. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Hilary* term, it appeared that the plaintiff, who is an agent in the Insolvent Debtors' Court, acted on the defendant's behalf in procuring his discharge, but previously to the commencement of this action had not delivered his bill one month, pursuant to the statute 2 *Geo.* 2. c. 23. s. 23. In the Insolvent Debtors' Court there is a tax-master whose duty it is to tax bills of costs for business done by the agents of the Court. It was objected on the part of the defendant that as the plaintiff had not delivered his bill a month previously to the commencement of the action, he could not recover. The Lord Chief Justice yielded to the objection, and directed a nonsuit, with leave, however, to the plaintiff to move to enter a verdict for 10*l.* if the Court should be of opinion that the case did not come within the 2 *Geo.* 2. *F. Pollock* having in *Easter* term last obtained a rule nisi accordingly,

Denman, C. S. now shewed cause. The question is, whether business done by an attorney of this Court in procuring the discharge of an insolvent debtor, comes within the operation of the 2 *Geo.* 2. c. 23. s. 23; for if it be, the plaintiff cannot maintain an action without delivering his bill one month at the least before it is commenced. Now the words of that act are express and positive, that no attorney or solicitor of any of the courts of *Westminster* Hall, &c. "shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such

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attorney or solicitor respectively shall have delivered unto the party to be charged therewith, a bill of such fees, charges and disbursements, subscribed with the proper hand-writing of such attorney," &c. The object of delivering the bill is in order to give the party to be charged an opportunity of having the costs taxed. Can it be said that the bill of costs in question does not come within the words "charges or disbursements at law or in equity?" The cases upon the construction of this clause of the act are all collected in Mr. *Tidd's* practice (*a*), from which it is clear that such business would be taxable. It has been held that bills of costs for business done at the Quarter Sessions must be delivered pursuant to the statute; *Ex parte Williams* (*b*), *Clarke* v. *Donovan* (*c*). If so, à multo fortiori, does the statute apply to business done in the Insolvent Debtors' Court. The fact of there being a tax-master in that court does not restrain the universality of the statute; and it lies upon the other side to shew some express exception which takes the bill in question out of the general rule.

F. Pollock, in support of the rule. This case does not come within the operation of the 2 *Geo.* 2. c. 23. on two grounds, first, that the fact of the plaintiff being an attorney of this Court must be laid out of the question; and, second, that the business for which the action is brought is not business done at law or in equity. First, by the Insolvent Debtors' Act, 1 *Geo.* 4. c. 119, the commissioners are, by s. 31, authorized in their discretion to appoint any number of fit persons to practise in the Insolvent Court, as attornies or agents; but the persons so appointed need not necessarily be attornies of this or any other superior court of record. It is clear that this Court has no control over the bills of an agent of the Insolvent Debtors' Court. But the Court is now called upon to construe the 2 *Geo.* 2. as com-

(*a*) 8th ed. 329. et seq. Vide 1 Archbold Pr. 33. et seq. 2d ed. 1 Doug. 199.

(*b*) 4 T. R. 496. (*c*) 5 Id. 694.

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prehending a bill made out by an agent of the Insolvent Debtor's, merely because he happens to be an attorney of the King's Bench. Now this would be rather an unreasonable construction, when it must be admitted that, but for that circumstance, his bill as an agent would not come within its operation. The effect of such a construction would be to place one set of persons practising in the same court under a different regulation from that of another. But it cannot be said that the case comes even within the policy of the act, for in the Insolvent Court there is a tax-master, who may decide upon the reasonableness of the charges, so that the defendant cannot allege that he has sustained any prejudice by not having the bill delivered before the action was brought. Secondly, however, the soliciting the discharge of an insolvent debtor is not a proceeding at law or equity. It is a proceeding under this particular act of parliament, which creates not a permanent court of record, but a tribunal with limited powers and temporary jurisdiction. Undoubtedly the Insolvent Court is a court of record, but it is so merely for the purposes of this act, and not a general court of record. That Court alone has jurisdiction over the bills of its officers, and therefore the fact of an agent of that Court being also an attorney of this Court, cannot subject him to the regulations of the 2 *Geo.* 2, which were never intended to apply to him when acting in a separate and distinct character.

ABBOTT, C. J.—I think the nonsuit in this case was right. I am of opinion that a bill signed as required by 2 *Geo.* 2. c. 23. s. 23, ought to have been delivered one month at the least before this action was commenced. The first question is, whether this was business done at law? Now if it is business done in order to obtain the liberation of a party from arrest by process issuing from a court of law, then it comes within the words of the statute. If an attorney cannot bring an action for business done at a court of Quarter Sessions without delivering his bill one month before-

hand, I cannot distinguish this case in principle from that. The difficulty which at first struck me was this, that the Court for the Relief of Insolvent Debtors may admit persons to practise as agents in their court, who are not attornies of the superior courts, and it is said—shall the business of an agent who is an attorney of this court be taxable, when the business of an agent who is not an attorney would not be taxable? I was a good deal struck by that argument, but I do not think it is conclusive of this question. There may be business done in other courts of law by persons who are not attornies, which is not taxable. A great deal of that which is usually done by an attorney at *Quarter Sessions*, may be done by a person who is not an attorney, such as serving notices, subpœnaing witnesses, and doing a great many other things which are done in such courts. Suppose a person to be employed by another to subpœna witnesses, serve notices, attend a trial, and take care of the witnesses, there is no doubt he would be entitled to remuneration for his services, but this Court would not have authority to tax the bill he should deliver. So also, if the Court for the Relief of Insolvent Debtors admits persons to practise there who are not attornies of the superior courts, the bills of such persons would not be taxable here; and therefore the argument urged for the plaintiff does not appear to me to be an answer to the objection now made. The plaintiff is an attorney of this Court; he has done business for another, which I consider to be business at law, and, consequently, the statute, 2 *Geo.* 2, appears to me to attach upon it. As to the appointment of an officer in the Insolvent Debtor's Court, to tax the bills of agents, that is a circumstance by no means conclusive upon this question; nor do I know that it is of any importance. Admitting for the present that there is a tax-master of that court, who has authority to tax bills as between the attorney and his client, still it does not appear to me that such a taxation would take the case out of the provisions of this act of parliament, which are extremely beneficial to the subject, by enacting that all

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attornies shall not recover their costs at law or equity without delivering their bills at least one month beforehand, whether they have or have not been taxed. No sufficient reason being suggested for taking this case out of the general provisions of the act of parliament, I think the plaintiff was bound to have delivered his bill one month before action brought, and having neglected to do so he cannot recover.

BAYLEY, J. concurred, and relying upon the principle of the cases *Exparte Williams* and *Clarke* v. *Donovan*, thought the fact of the plaintiff being an attorney of this Court rendered his bill taxable here, though it was for business done in the Insolvent Debtors' Court.

HOLROYD, J. and LITTLEDALE, J. were clearly of opinion that the case came within the words of the 2 *Geo.* 2.

Rule discharged.

S. BOSC, Widow, *v.* N. A. SOLLIER.

The Court will give credit to its own officers, that they have observed all proper forms in taking affidavits. Therefore where the jurat to an affidavit of debt made by a foreigner, certified that the "affidavit was interpreted by *F. C.* of &c. professor of languages, (he having first sworn that he understood the *English* and *French* languages,) to the deponent, who was afterwards sworn to the truth thereof:"—Held, that the jurat was sufficient, though it did not appear thereby that the deponent understood the language in which the affidavit was interpreted, or that the interpreter was sworn truly to interpret.

CAMPBELL, on a former day, obtained a rule calling on the plaintiff to shew cause why the bail bond given by the defendant in this case should not be delivered up to be cancelled, on the defendant's filing common bail, on the ground of a defect in the jurat of the affidavit to hold to bail. The plaintiff was a native of *France* and did not understand the *English* language. The affidavit of debt was in the common form, in which the plaintiff swore that the defendant was justly and truly indebted to her in the sum of 1315*l.* and upwards for money lent and advanced. The jurat was in the following terms, "This affidavit was interpreted by *Francis Chanvet*, of 44, *Cleveland Street*,

Fitzroy Square, in the county of *Middlesex*, professor of languages, (he having first sworn that he understood the *English* and *French* languages,) to the deponent, who was afterwards sworn to the truth thereof at No. 62, *Great Titchfield Street*, in the said county. 31st *May*, 1825. Before me, *E. J. Boddy*, deputy signer of the bills of *Middlesex*." The objection to this jurat was, that it did not state therein that the plaintiff understood either the *French* or *English* language, or that the interpreter was sworn duly to interpret the oath and affidavit.

Copley, A. G. and *E. Lawes* now shewed cause on an affidavit made by Mr. *Boddy*, the deputy signer of the bills of *Middlesex*, stating that the jurat in question was in the usual form adopted in the office for the last eight years, on similar occasions (*a*). The Court must give credit to its own officers that every proper form has been observed in taking an affidavit of debt. There is enough on the face of the jurat here to shew that the affidavit of debt was duly interpreted to the plaintiff, and that is sufficient. The jurat here is in the common and usual form. There is no rule of Court, as in the case of a marksman, requiring a special jurat. But even in the case of a marksman, the Court is satisfied with the certificate of the commissioner, taking the affidavit or signing the jurat, that the affidavit was read in his presence to the party making the same, who seemed perfectly to understand it, and made his mark in his presence. If credit is given to the statement of the officer in

(*a*) The jurat to another affidavit made by the plaintiff and produced on shewing cause against this rule was in the following terms, "Sworn by the deponent *Susannah Bosc*, by the interpretation of *Pennon de la Ferrage*, at the residence of the said *Susannah Bosc*, No. 62, *Great Titchfield Street*, in the county of *Middlesex*, (she being confined to her said residence by infirmity and indisposition, and the said *Pennon de la Ferrage* having been first duly sworn before me faithfully and truly to interpret the contents of this affidavit to the said *Susannah Bosc* in the *French* language, and the oath to be administered to her thereon,) this eleventh day of *June*, 1825. Before me,

J. Ellis, a commissioner, &c.

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the one case, why should not the like credit be given to him in this, that all proper forms have been observed. In the case of *Omealy* v. *Newell* (a) it was held, that an affidavit of debt made by a plaintiff in a foreign country before a foreign magistrate, whose signature to the *jurat* and authority to administer oaths and take affidavits there was verified by a proper affidavit in this country, was a sufficient foundation for a judge's order to hold a defendant to special bail. This is an attempt to introduce a new rule of practice for which there is no necessity.

Campbell, contrà. The onus lies on the other side to shew that the plaintiff was duly sworn to the contents of the affidavit to hold to bail; it does not lie on the defendant to prove the negative. Now giving full credit to all that is stated in the jurat, it does not appear that the plaintiff was properly sworn. It may be true that the interpreter understood the *English* and *French* languages, but non constat that the plaintiff understood either. The jurat certifies that the plaintiff was sworn to the truth of the affidavit, but it does not appear that the interpreter was sworn to interpret it to her, or that he could interpret it in a language which she could understand. How can the signer of the writs, who is not a *Frenchman*, certify that the plaintiff was duly sworn? Giving full effect therefore to all that is stated, still there is nothing to shew that the affidavit was duly sworn. The case of *Omealy* v. *Newell* is perfectly distinguishable from this, because in that case there was an affidavit that the person who described himself in the jurat as the magistrate who had administered the oath, was in fact such a person as he described himself to be.

Abbott, C. J.—I think the jurat is sufficiently certain to justify us in drawing the conclusion that the affidavit was duly sworn. It alleges that the affidavit was interpreted to the deponent. Now that could not be, unless the deponent

(a) 8 East, 364.

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and the interpreter understood one and the same language. We must trust the certificate of our own officer when he informs us that the deponent was sworn to the truth of the affidavit. If that part of the jurat which comes in by way of parenthesis, speaking of the interpreter, " he having first sworn that he understood the *English* and *French* languages," had been left out, still the jurat would have been sufficient. If it were necessary however to supply the alleged defect, it might be supplied by an affidavit stating the fact, that the plaintiff understood the language in which the oath and the affidavit of debt were interpreted. We must trust to our officer that he does not suffer a party to make an affidavit, without taking care that the deponent understands what he swears.

The other judges concurred.

Rule discharged.

A custom for " the parishioners" of a parish to elect a curate to the perpetual curacy thereof, will not legalize an election where some of the parishioners were excluded from voting, and the rest voted *by ballot.*

Non-payment of *church* rates does not disqualify a parishioner from voting in vestry.

An election, *by ballot*, of a curate of a parish by the parishioners, is illegal and void.

FAULKNER, Clerk, *v.* ELGER and NEWBY (*a*).

CASE for a false return to a writ of mandamus. The declaration stated that before and at the time of suing out the writs of mandamus, and committing the grievances hereinaftermentioned, defendants were churchwardens of the parish of *Saint Sepulchre* in the town of *Cambridge*, in the county of *Cambridge*; that the said parish of *Saint Sepulchre*, before and at &c. was and still is a perpetual curacy within the diocese of *Ely*, endowed with a yearly salary; that the clerical functions and duties of the said curacy during all the time aforesaid, have been and still ought to be performed by a perpetual curate, having taken holy orders; that from the time of the endowment of the said curacy hitherto, there

(*a*) By virtue of the King's warrant issued during term, the puisne judges of this Court sat from the 27th *June* till the 2d *July*, and from the 31st *October* to the 5th *November* both inclusively. This and the following cases were decided at these sittings respectively.

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has been and still is within the said parish, a good and laudable custom there used and approved of, that whenever the said curacy becomes and is vacant by death or otherwise, the parishioners of the said parish have been used and accustomed, and still of right ought, to elect a fit and proper person in holy orders to be the perpetual curate, which person, the churchwardens and parishioners of the said parish, during all that time, have been used and accustomed and still of right ought to nominate to the Bishop of *Ely* to be licensed; that on the 23d *November*, 1823, a vacancy occurred in the said perpetual curacy by the resignation of the perpetual curate thereof, and that plaintiff, being a person having taken holy orders, was thereupon duly and according to the custom of the said parish elected by the parishioners to be the perpetual curate of the said perpetual curacy, and thereupon it became and was the duty of defendants so being such churchwardens as aforesaid, to summon a meeting of the said parishioners, in order that plaintiff might by defendants and the said parishioners be nominated to the Bishop of *Ely* for a license to the said perpetual curacy; that plaintiff having been so elected, afterwards applied to defendants so being such churchwardens, and required them to summon a meeting of the said parishioners for the purpose aforesaid, but they refused and neglected so to do; that thereupon afterwards to wit, on 31st *May*, 1824, plaintiff obtained a writ of mandamus directed to the churchwardens of the said parish, reciting, &c., (all the foregoing allegations were then set out at full as the recital of the writ of mandamus) and commanding them to call a meeting of the said parishioners of the said parish, in order that they might nominate plaintiff to the Bishop of *Ely*, for a license to him as perpetual curate of the said curacy, and that the said churchwardens should join in such nomination or shew cause to the contrary thereof; which said writ was afterwards to wit, on the 15th *June*, 1824, delivered to defendants so then being such churchwardens to be executed in due form of law. Yet defend-

ants did not nor would call a meeting of the said parishioners &c., but wholly refused &c., and on the contrary thereof afterwards and on the return of the said writ, falsely and maliciously returned that plaintiff was not duly, and according to the custom of the said parish, elected to the said perpetual curacy in manner and form as by the said writ was alleged. Wherefore they could not call a meeting of the said parishioners of the said parish in order that they might nominate plaintiff to the Bishop of *Ely* for a license to him as perpetual curate of the said curacy as by the said writ &c. more fully appears. By means of which said several premises, &c. plaintiff has been and is damnified, &c. Plea, the general issue, not guilty, and issue thereon. At the trial before *Gaselee*, J. at the last *Lent* assizes for the county of *Cambridge*, the first question was, whether the plaintiff was bound to give evidence in support of all the prefatory allegations in the declaration, (set out above), or whether, those allegations being all set out in the writ of mandamus, and the return not having taken issue on the writ, the allegations were not in effect admitted by the defendants, and the necessity of proving them dispensed with; and the learned judge being of opinion that the defendants had in effect admitted the allegations, they were taken as proved, and the mandamus and return having been produced and proved, the plaintiff was allowed to go into the merits of his case. Several witnesses were then called, who proved that the curacy became vacant, and that an election for a successor was held; that plaintiff was one of the candidates and had thirty-four votes; that a Mr. *Robinson*, another candidate, had thirty-six votes; that several persons who tendered their votes were rejected upon the ground that they had not paid church rates; that no previous notice was given that parishioners who did not pay church rates would not be allowed to vote, but that before the election commenced a resolution to that effect was carried by the persons then present, but no minute or record of such resolution was made; that several persons were in consequence of this resolution prevented from voting for the plaintiff, and

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several were prevented from voting for Mr. *Robinson*, but the exact number of those who would otherwise have voted for the one or the other did not distinctly appear; that the election took place by ballot, and that Mr. *Robinson* was declared duly elected. It was further proved that in 1791 the parishioners, generally, had elected a perpetual curate, but no other instance was adduced of an election by them, nor was there any evidence of any election in any other mode. Upon this state of facts the learned judge reserved for the consideration of the Court three questions of law: first, whether the allegations in the declaration ought to have been distinctly proved at the trial; second, whether the exclusion of those parishioners who had not paid church rates was illegal and made the election void; and third, whether the voting by ballot in such a case was a legal mode of election: and left to the jury two questions of fact, first, whether there was or was not within the parish a custom for the parishioners generally to elect their curate; and secondly, which of the candidates, subject to the qualifications of the voters, had the most votes. The jury found that there was a custom within the parish for the parishioners, generally, to elect their curate, and that the plaintiff had most votes, namely, that he had thirty-eight, and Mr. *Robinson* thirty-seven, and, accordingly, returned a verdict for the plaintiff, damages 200*l*.

Robinson, in *Easter* term last, obtained a rule nisi in the alternative, either to enter a nonsuit, or a verdict for the defendant, and relied upon the ground that no such evidence had been given of the custom for the parishioners to elect the curate as would sustain the plaintiff's declaration; and against that rule

Storks and *Dover* now shewed cause. Sufficient evidence was given of the existence of the custom stated in the declaration, for it was proved to have been once used, as stated, in the year 1791, and not a tittle of proof was offered of a contrary nature, or to shew the existence of any

other mode of appointing the curate. Assuming, therefore, the custom to be proved, *all* the parishioners had a right to vote, and supposing they had done so, the verdict is right, for the jury have found that a majority intended to vote for the plaintiff. The non-payment of *church* rates does not disqualify a person from voting in vestry; payment of scot and lot would, by the common law, entitle him to a voice in all vestry proceedings; and the only disqualification mentioned either in the 58 *Geo.* 3. c. 69. s. 5, or in the 59 *Geo.* 3. c. 85. s. 3, is, the non-payment of *poor* rates. It will, perhaps, be said, that the votes thus rejected were not formally and legally tendered, and therefore the plaintiff has no reason to complain of their rejection; but the resolution agreed to, that no person who had not paid church rates should vote, had the effect of keeping back those votes, therefore no tender was necessary, for the injury inflicted upon the plaintiff was the same. The election by ballot was an ordinary and proper mode of election, and as it was approved and adopted at the time by a majority of the parishioners then present, cannot now be objected to. The question whether or no the election by parishioners of their own curate by ballot is good, as a question of law, is new; no cases can be found to bear upon it; and it can be decided upon principle only. There is no doubt that, generally speaking, parishioners have the power of making regulations for the management of the affairs of the parish; *Stoughton* v. *Reynolds* (*a*); and they did no more by agreeing to vote by ballot in this case. The parishioners are quasi a corporation, and to such an extent have the same powers. It is clear that an election by shew of hands would be good; then why not by ballot? The parishioners may elect their own officers in any mode they please, and the whole body must be bound by the majority. 16 *Vin. Abr.* 183. *Parishioners.* Here they adopted the mode of ballot, and the choice of the majority in so doing bound the rest, even if the choice was not unanimous.

(*a*) 2 Stra. 1045.

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Robinson, (with whom was *Steer,*) contrà. The election was illegal and void throughout, and on that short ground this action is not maintainable. Before any votes were tendered or accepted, two resolutions were adopted by a majority of the persons present; one, that the election should be by ballot, and the other, that certain of the parishioners should not be allowed to vote. Now no portion of the parishioners had any right or power to adopt or act upon either of those resolutions, consequently the whole of the subsequent proceedings were illegal and void. (Here the Court stopped him.)

BAYLEY, J.—The right of election is stated, both in the mandamus and in the declaration, to be in the parishioners by the custom of the parish, and the plaintiff by this action asserts that he was duly elected according to that custom. In order, therefore, to sustain this action, he must shew that he had a majority of good and legal votes, and that the election throughout was conducted in a good and legal manner. Before the election began two resolutions were adopted; one, that those parishioners who had not paid the church rate should not be allowed to vote; and the other, that the election should be by ballot. Now, the first was, in my opinion, clearly an illegal resolution. By the statutes already cited, no parishioner who has neglected to pay any poor rate can vote in any vestry. But a church rate differs materially from a poor rate. A poor rate is a measure of constant and public necessity; always renewable and always renewed; but a church rate is an occasional measure only, made by ecclesiastical persons, and for ecclesiastical purposes, and made only when required. I think such a resolution was illegal, and that *no* election founded upon it can be valid, however regular it may be in other respects; because it is impossible to ascertain what number of persons may thus be disqualified from voting. But without laying much stress on this point, I am decidedly of opinion that the second resolution was illegal, and that an

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election by ballot in a case like this was a void election. No case has been cited in which such a mode of election by parishioners has been recognized as legal; and the common law mode is undoubtedly by shew of hands, and afterwards, if demanded, by poll. To have a *vote*, and to have a *voice* at an election, is one and the same thing; but if a man ballots at an election, he has clearly no *voice* at it. The objections to such a mode of election are equally obvious and numerous. In the first place, a scrutiny, in the real sense of the word, is impossible; it can go no further than the number of votes: it cannot at all extend to the qualifications of the voters. Secondly, it is impossible when the election is once over to try the validity of it, at least, without opening a wide and alarming door for perjury. Third, it is peculiarly open to bribery, and undue secret influence of every kind. In addition to these objections, even if an election by ballot in this case could be good by custom, the plaintiff has failed to prove the existence of any custom for the parishioners to elect at all, nor, even if he had shewn that, has he shewn the consent of all the parishioners that the election should be by ballot. Upon all these three grounds, therefore, I am of opinion that the plaintiff has not made out any case, and that the rule for entering a nonsuit must be made absolute.

HOLROYD, J.—The plaintiff has not proved that he was elected according to the custom which he has set out on the record, because the custom is for *all* the parishioners to elect, and at his election a part of the parishioners were excluded. On that short ground I form my opinion that the plaintiff must be nonsuited, and I think it unnecessary to *decide* the other questions raised in this case. But I am very strongly inclined to *think* that both the resolutions adopted previous to the election were illegal; and I entertain very great doubt, to say the least, whether an election by ballot of a curate by the parishioners of a parish can be legal; for I take it to be the duty of the returning officer at

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every election to ascertain and know that the party elected has been duly elected, and by whom; which he cannot possibly do, where the election is by ballot.

LITTLEDALE, J.—The persons who conducted this election have acted upon a mistaken principle in two respects, and have consequently rendered it void; first, by excluding some of the parishioners from voting, and secondly, by conducting the election by ballot. The resolution disabling those who had not paid the church rate from voting, was clearly illegal; that was no disqualification in itself, and, even if it was, one part of the parishioners had no power to impose it upon the other; for a parish vestry is not like a corporation, and has no power to make a bye-law to bind the whole parish. The resolution to vote by ballot was equally illegal, for an election by ballot is bad by the common law; and wisely so, for if such an election comes to be disputed, innumerable and insuperable difficulties stand in the way of any scrutiny of it, and both law and justice would be in almost every instance defeated. On all the points raised I perfectly agree that a nonsuit must be entered.

Rule absolute for entering a nonsuit.

WOODCOCK *v.* GIBSON and others.

Two overseers, one of whom is also sole churchwarden, do not constitute a body corporate within the meaning of the 49 *Geo.* 3. *c.* 12. s. 17, and the parish property does not vest in them.

TRESPASS for breaking and entering plaintiff's close, called the Garden, in the parish of *Thorp*, cutting the vegetables, &c. Pleas, first, not guilty. Second, liberum tenementum in defendant *Gibson* and one *Joseph Taylor*, then being the sole churchwarden of the parish of *Thorp*. Third, liberum tenementum in *Gibson* and *Taylor*, as and then being the overseers of the poor, and *Taylor* then being the sole churchwarden of the said parish of *Thorp*. Replications, to each plea respectively, that the close belonged to plaintiff, and not to *Gibson* and *Taylor* modo et formâ.

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Issue thereon. At the trial before *Best*, C. J. at the *Lincoln* summer assizes, 1824, the trespass having been admitted, it was proved on the part of the defendants, that the locus in quo was the property of the parish; that *Gibson* and *Taylor* were appointed overseers of the poor on the 5th of *April*, 1823; that *Taylor* was appointed sole churchwarden on the 22d of the same month; and that it was the custom in the parish to have only one churchwarden; and it was thereupon contended that the locus in quo vested in them by virtue of the statute 49 *Geo.* 3. c. 12. s. 17, and therefore that the action was not maintainable. The Lord Chief Justice yielded to the argument, but directed the jury to assess the damages upon the second and third issues, in order to save the expense of a second trial in the event of the Court being of opinion that the freehold was not vested in the defendants. The jury assessed the damages at one penny, and the plaintiff was nonsuited.

Clarke in *Michaelmas* term last obtained a rule nisi to set aside the nonsuit and to enter a verdict for the plaintiff, against which

S. M. Phillips now shewed cause. The only question is, whether the evidence given at the trial was sufficient to support either the second or third plea, that is, whether the property in the premises had vested in the defendant *Gibson*. [*Bayley*, J. *And* in *Taylor*: it vested in them both jointly, if at all.] Certainly, and the argument is, that they were the parish officers, duly appointed, and as such seised of all parish property. The words of the 17th section of the statute 49 *Geo.* 3. c. 12, are these—" All buildings, lands, and hereditaments, which shall be purchased, hired, or taken on lease, by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, &c. to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such church-

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wardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and all other buildings, lands. and hereditaments, belonging to such parish." Now *Gibson* and *Taylor* were appointed overseers before *Taylor* was appointed churchwarden; the property, therefore, vested immediately in the two, as overseers, and the question whether the appointment of the one as churchwarden, was, or was not, legal and regular, becomes immaterial. [*Bayley*, J. If the property vested in them at all, would it not vest in them jointly with the then churchwardens? The churchwardens *and* overseers constitute in law *one* officer, and the body corporate created by the statute consists of "the churchwardens *and* overseers."] Non constat that there was any existing churchwarden at the time when *Gibson* and *Taylor* were appointed overseers; and if not, the property did vest in them, and the second plea was proved, and is an answer to the action. The objection will be that these persons were not overseers within the meaning of the act of parliament, because one of them was churchwarden also, and *Rex* v. *All Saints, Derby* (*a*), will be relied on. But that case does not apply to the present. The decision there was only that an indenture of apprenticeship executed by *two* persons styling themselves churchwardens and overseers, but who were appointed overseers at the time when one of them was churchwarden, was not a good indenture within the meaning of the statute 43 *Eliz.* c. 2. s. 1, which requires the binding to be by the churchwardens and overseers, or the greater part of them: because the powers of that act were given at all events to a body constituted of more than two persons. But these are mere naked powers, and must be strictly and literally pursued; here, there are no powers to be executed, and the simple question is, whether by operation of law the property did not vest in the overseers. It is submitted that it certainly did; and if so, there was

(*a*) 13 East, 143.

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nothing done afterwards to devest it, and consequently this action was not maintainable.

Clarke and *N. R. Clarke*, contrà. *Rex* v. *All Saints, Derby* (*a*), is expressly in point with the present case. It was there decided that there must be two overseers, besides the churchwardens, acting, in order to satisfy the requisites of the 43 *Eliz.* c. 2. Now both that statute and the 49 *Geo.* 3. c. 12, speak of the churchwardens *and* overseers as a body corporate; the latter, therefore, must be construed like the former, and the powers given by it cannot vest except in the churchwardens *and* overseers, jointly, as a body corporate. But at the time of the trespass *Gibson* and *Taylor* were not, nor ever had been, the churchwardens and overseers of the parish, nor had they ever constituted a body corporate; therefore the property did not, nor could by possibility, vest in them. Then, neither of the pleas was made out in evidence, and the plaintiff was entitled to a verdict.

BAYLEY, J.—The 17th section of the 49th *Geo.* 3. c. 12, undoubtedly vests the parish property in the churchwardens *and* overseers of the parish, as a body corporate, and in that character only. The property, therefore, vests in all, or in none, and until both churchwardens and overseers are appointed, there is no body corporate in existence, and nothing vests in any of the officers. Here, *Gibson* and *Taylor* were appointed overseers on the 5th of *April*, and if there was then a churchwarden in existence, the property might have vested in him and the overseers; but there is no such plea upon the record, and there was no such evidence at the trial. Then, *Taylor* was appointed churchwarden on the 22d of *April*, but as he was already one of the overseers, that was an illegal and invalid appointment; so that *Gibson* and he never constituted a body corporate, consisting of the churchwardens and overseers, either before or after that appointment. The property, therefore, never vested in

(*a*) 13 East, 143.

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them, and neither of these pleas was supported by the evidence: consequently the rule for entering a verdict for the plaintiff must be made absolute.

HOLROYD, J.—It is quite clear that neither of these pleas was made out in evidence. There never was any body corporate such as the act of parliament requires, therefore the property never vested at all.

LITTLEDALE, J. concurred.

Rule absolute.

FLINT, Gent. one, &c. v. PIKE.

Plea to an action for a libel, purporting to be the report of a trial, "that the alleged libel was, in substance, a true report of the trial:"—Held, bad on demurrer.

Counsel, in the discharge of their duty, are privileged to utter matter injurious to individuals; but the subsequent publication of such matter is unlawful.

CASE for a libel. The declaration stated that before the publishing of the libel plaintiff was an attorney, and had been retained to bring and prosecute a certain writ and plea of waste in the Court of Common Pleas, in which *T. R.* and others were plaintiffs, and *S. S.* was defendant. It then set out the declaration in waste, and the plea that the defendant had not committed any waste, and stated that issue was joined on that plea, that the cause was tried at the *Derbyshire* assizes, 1823, and that the jury found that the defendant had not committed any waste. It then stated that defendant, well knowing the premises, &c. maliciously published of and concerning plaintiff the libel, purporting to be a report of the said trial. It then set out the libel, which professed to give a brief summary of the facts of the case, and then stated that *A.* was counsel for the plaintiffs, and *B.* for the defendant, and that the latter was both extremely severe and amusing, at the expense of Mr. *Flint*, the plaintiffs' attorney. It then professed to give an outline of the speech of the defendant's counsel, setting out a part of it, which contained very severe reflections upon the present plaintiff, insinuating that he had brought the action of waste, and had advised that particular form of action, entirely for his own profit. The evidence given at the trial

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was not set out. Plea, that the alleged libel was, in substance, a true report of the trial. Demurrer to the plea, and joinder in demurrer.

Manning, in support of the demurrer. *Lewis* v. *Walter* (*a*) and *Duncan* v. *Thwaites* (*b*) are authorities to shew that a man is not justified in publishing the mere result of evidence, or that which appears to him to be the substance of a trial: this plea, therefore, is bad, for it merely justifies the libel as being, *in substance*, a true report of the trial. But, even if the plea were good, it would not be an answer to the action, because nothing can justify the publication by a third party of words actionable in themselves. *Brook* v. *Montague* (*c*) and *Hodgson* v. *Scarlett* (*d*) have, it must be admitted, decided, that for defamatory words, spoken either by a party or counsel in the course of a judicial proceeding, no action will lie; but the principle upon which the law protects counsel acting in the discharge of their professional duty, even when they utter slanderous expressions, is, that experience has proved it to be advantageous for the due administration of public justice, that counsel so acting should be allowed unlimited freedom of speech. But that principle does not extend to the publication, by any third person, of such slanderous expressions, and such a publication, therefore, is not protected. So, for defamatory words, however injurious to the party, spoken by a member of parliament, in parliament, neither a civil action nor a criminal prosecution can be maintained; because it is at once constitutional and for the public good, that members of parliament, in parliament, should be allowed unlimited freedom of speech. But the subsequent publication of the very same words, even by a member of parliament himself, has been held to be an indictable offence: *Rex* v. *Lord Abingdon* (*e*) and *Rex* v. *Creevey* (*f*). Upon the authority of these latter cases it seems clear that the subsequent publication

(*a*) 4 B. & A. 605. (*b*) Ante, vol. v. 447.
(*c*) Cro. Jac. 90; 1 Rol. Abr. 87, (M) Pl. 1. S. C.
(*d*) 1 B. & A. 232. (*e*) 1 Esp. 226. (*f*) 1 M. & S. 273.

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of slander, uttered by counsel in the course of a judicial proceeding, is illegal, and, consequently, actionable. This plea, however, is bad in itself; first, as it tends to an uncertain issue, and second, as it is repugnant to the libel, the publication of which the defendant has admitted, for it is perfectly plain, upon reading the libel as set out in the declaration, that it could not possibly be, even in substance, a true report of the trial.

N. R. Clarke, contrà. First, the plea is good in form. Evidence that the libel was true *in substance* would have supported an averment that it was a *true report* of the trial; therefore the averment that it is *in substance* a true report is equivalent to an averment that it is a *true report*. It was decided by this Court in *Weaver* v. *Lloyd* (*a*), that where a defendant, by his plea, said that a libel was true *in substance and effect*, that must be understood to mean that every material particular contained in it was true; and that the same proof was requisite there, as would have been requisite for a plea stating that all the matters contained in the libel were true. Second, this is a protected publication, for which no action is maintainable. *Curry* v. *Walter* (*b*), *Rex* v. *Wright* (*c*), and *Rex* v. *Fisher* (*d*), are authorities which fully establish the right of publishing a fair and honest account of the proceedings of courts of justice, even though the publication may tend to the injury of some individuals. "Trials at law, fairly reported," said Lord *Ellenborough*, in the case last cited, "although they may occasionally prove injurious to individuals, have been holden to be privileged: let them continue so privileged. The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental." If this plea is held bad, the important object there pointed out will necessarily be defeated. [*Bayley*, J. Was not the defendant bound to state in his publication the evidence given at the trial as well as the speech of counsel commenting upon that

(*a*) Ante, vol. iv. 230.
(*b*) 1 Bos. & Pul. 525.
(*c*) 8 T. R. 293.
(*d*) 2 Camp. 563.

evidence? Was he justified in publishiug such a speech at all? Counsel may be privileged to utter defamatory matter, but it by no means follows that others are privileged to publish it; and assuming that it is lawful to publish the history of a trial, it may not necessarily be lawful also to publish every part of it, when some parts are injurious to individuals. Is not the party in such a case bound to withhold those parts which are injurious to individuals?] It may be a question of great nicety, and much too difficult for editors of newspapers to resolve, whether such particular matters are or are not so far injurious to individuals, as to make the subsequent publication of them *libellous*; therefore, to hold that they must abstain from publishing any part of the proceedings in courts of justice, would be, in effect, to prohibit them from publishing such proceedings at all; which would be a public injury.

Manning, in reply, was stopped by the Court.

BAYLEY, J.—I have no doubt that the publication of *many* of the proceedings of our courts of justice is extremely beneficial to society at large, and that it is, upon that principle, lawful; but it by no means follows that it is lawful to publish *all* such proceedings. It is not an unlimited privilege, and does not, in my opinion, extend to the publication of the whole of a trial, where parts of it are injurious to an individual; much less to the publication of part only, where that part is libellous. This libel professes to set out the speech of counsel for a defendant, containing many severe observations on the conduct of the present plaintiff, but the evidence upon which the speech was founded it does not state. If the evidence had been stated, though that, even if it proved the speech to be well founded, might not have justified the publication of it in law, still it would have given the reader an opportunity of forming his own opinion upon that point. But here the question is, whether the defendant was at liberty to publish the speech of counsel, containing matter injurious to the plaintiff, without

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detailing the evidence in the cause. I am clearly of opinion that he was not. The speech of counsel is privileged by the occasion on which it is spoken, however calumnious or libellous it may be; and the law allows him that privilege, because it is for the advantage of the administration of public justice, that he should possess an unlimited freedom of speech. But it by no means follows that every editor of a newspaper is entitled afterwards to publish language used by counsel in the course of a cause, which is injurious to individuals; the reason of the privilege does not go so far: the occasion justifies the one, but not the other. In *Rex* v. *Lord Abingdon* (*a*) and *Rex* v. *Creevey* (*b*), the defendants were held to be criminally liable for publishing in newspapers speeches which they had previously delivered in parliament: nor is that a new doctrine; for in *Lake* v. *King* (*c*) it was held that where a petition, presented to a committee of the House of Commons, containing libellous matter, was ordered by the House to be printed *for the use of the members*, and was afterwards published elsewhere, such subsequent publication was unlawful, because it extended beyond that which the privilege of parliament required. So, I think, the subsequent publication of a speech, made by counsel in a cause, containing libellous matter, is unlawful, because it extends beyond that which is required for the administration of justice. It is said that this will work a hardship upon the editors of newspapers, because they are not competent judges of what matters are libellous, and what are not; but I think there is no weight in the argument, for, in my opinion, if they are not competent to judge what is libellous and what is not, they are not fit persons to be entrusted with the power of publishing any thing at all: and, besides, in this case, no man of the most ordinary sense could doubt that the speech in question was libellous. My opinion is, that a party is at liberty to publish a fair and correct history of a trial, so far as the facts of the case, and the law as applied to those facts; but that he is not at liberty to publish the speech of counsel, containing matters injurious to indi-

(*a*) 1 Esp. 226. (*b*) 1 M. & S. 273. (*c*) 1 Saund. 120.

viduals. Upon that ground I am of opinion that this plea is bad, and that our judgment, therefore, ought to be for the plaintiff.

HOLROYD, J. concurred.

LITTLEDALE, J. concurred also, and mentioned the case of *Wright* v. *Clement* (*a*), where a declaration stating that the defendant published a libel, containing libellous matters, "*in substance* as follows," and then setting out the libel with innendoes, was held bad on motion in arrest of judgment, as being in point to shew that the plea in this case was bad.

Judgment for the plaintiff.

(*a*) 3 B. & A. 503.

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Averment, that defendant warranted a horse to be sound. Proof, that defendant warranted the horse to be sound every where, except a kick on the leg:—Held, that this was a qualified warranty, and constituted a fatal variance between the declaration and the evidence.

ASSUMPSIT that in consideration that plaintiff, at the request of defendant, had bought a horse of him, defendant undertook that it was sound. Plea, non-assumpsit. At the trial before *Littledale*, J. at the last *Lent* assizes for the county of *Hereford*, it appeared in evidence that the horse, when sold, bore the marks of having received a kick upon one leg, but was not then, nor ever had been, lame; that the defendant warranted the horse sound every where, except the kick on the leg; but that it was in fact unsound in another respect, having had a dropsy at the time of the sale. It was objected, on the part of the defendant, that the warranty declared upon being general, and the warranty proved being qualified, there was a fatal variance between the declaration and the evidence, and therefore the plaintiff must be nonsuited. On the part of the plaintiff, *Garment* v. *Barrs*(*b*) was cited to shew that this was not a fatal variance. There,

(*b*) 2 Esp. 673.

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the declaration was upon a general warranty. The evidence was, that at the sale the defendant warranted the mare to be sound, but, upon the plaintiff observing that she went rather lame of one leg, the defendant said, that that had been occasioned by her taking up a nail at the farrier's, and, except as to that lameness, she was perfectly sound. It was contended that the plaintiff must be nonsuited on the ground of a variance; but *Eyre*, C. J. said, "A horse labouring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not for that an unsound horse; and where a warranty is made that such a horse is sound, it is made without any view to such injury; nor is a horse so circumstanced an unsound horse within the meaning of the warranty. I am of opinion, that to make the exception such as ought to have been stated in the declaration, as a qualification of the general warranty, so as to make a fatal variance between the warranty really made and that stated in the declaration, the injury the horse had sustained, or the malady under which he laboured, ought to be of a permanent nature, and not such as arose from a temporary injury or accident." Upon the authority of that case the learned judge refused to nonsuit, and directed the jury to find their verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

W. E. Taunton, in *Easter* term last, moved accordingly, and obtained a rule nisi, against which

Jervis and *Curwood* now shewed cause. *Garment* v. *Barrs*(*a*) must govern this case. It is an authority expressly in point. This was a general, and not a qualified warranty, for a kick would not of necessity produce unsoundness. If the kick, which was the thing excepted, had per se constituted an unsoundness, this would have been a qualified warranty; but here the thing excepted neither amounted to unsoundness at the time of the sale, nor turned

(*a*) 2 Esp. 673.

out to be so afterwards. [*Bayley*, J. So that your argument is this:—this was a general or a qualified warranty, according as the kick might or might not, at some future time, turn out to be an unsoundness. Is not that a qualified warranty? It is dependent on a contingency, which may or may not happen; surely that qualifies the warranty: and if so, proof of a qualified warranty cannot support an averment of a general warranty.]

Taunton and *Campbell*, contrà. This was a qualified warranty, because the kick, which was excepted, might eventually have produced unsoundness. That single observation is conclusive of the case. As to *Garment* v. *Barrs*, it is essentially different from this case, for there, in the first instance, there was a general warranty, and, afterwards, an exception of a lameness by taking up a nail at the farrier's; here, there never was a general warranty, it was always qualified by the exception of the kick on the leg.

BAYLEY, J.—This case is really too plain for argument. The declaration pretends to state the real bargain made between the parties, and the real warranty given, at the time of the sale. The question, therefore, is, whether it was understood and agreed between the parties at the time when the contract was made, that the horse was warranted sound generally, or with the exception of any unsoundness which might result from the kick on the leg. Now it was proved, that at the time of the sale the horse had received a kick on the leg; that that kick might or might not eventually produce unsoundness; and that the defendant's language to the plaintiff was, "I will warrant against any unsoundness, except an unsoundness which may result from the kick on the leg." I am clearly of opinion that that was a qualified warranty; there is, as it appears to me, nothing general, or absolute, or unconditional, about it. It is indeed exceedingly difficult to distinguish this case from *Garment* v. *Barrs*, but I must confess that I was never perfectly

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satisfied with the reasoning of Lord Chief Justice *Eyre* in that case. He there lays it down, that in order to constitute a variance, the injury under which the horse laboured must be of a permanent nature, and not one arising from a temporary accident. If that reasoning is correct, the warranty in many cases will be contingent, and will ultimately prove either general or qualified, according as the injury eventually turns out to be permanent or temporary. I think the nature of a warranty cannot depend upon such a question (*a*); it must, in my opinion, depend entirely upon the question, what was the understanding and intention of the parties at the time when the contract was made. Here, if it had turned out that the horse had a permanent unsoundness arising from the kick on the leg, the defendant certainly could not have been held liable upon this warranty; but if he had given a general warranty, he as clearly would have been liable. The contracts, therefore, are substantially different, and this is a fatal variance. The rule for a nonsuit, consequently, must be made absolute.

The other judges concurred.

Rule absolute.

(*a*) Vide *Elton* v. *Brogden*, 4 Camp. 281.

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A., being lord of the manors of *B.* and *C.*, by lease and release of 1773, bargained and sold to *D.* "all that messuage, tenement or boat-house, &c. and also all that and those sea-grounds, oyster-layings, shores and fisheries, commonly called and known by the names of *B.* and *C.* shores or sea-grounds, with full and free liberty to *D.* and his heirs and assigns for ever to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same, which said sea-grounds, oyster-layings, shores, and fisheries, extend from the south at low water mark, to the north at high water mark, and abut towards the east and the west upon certain other sea-grounds, and all which said sea-grounds, oyster-layings, shores, and fisheries, hereby granted, conveyed, &c. contain, in the whole, by estimation, 800 acres of land

THIS was an action of trespass for breaking and entering three closes of the plaintiff, situate in the parish of *Prittle-*

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well, in the county of *Essex*, lying respectively southward of the cliff, and part or parcel of the present sea-beach or shore, digging up the soil, and taking, carrying away and converting the stones and shingle. Plea, not guilty, and issue thereon. At the trial before *Graham*, B. at the last *Lent* assizes for the county of *Essex*, the case was this:—The plaintiff was lord of the manors of *Middleton Hall* and *Prittlewell Priory*, and tenant for life of an estate situate at *Southend* and *Prittlewell*, and bounded southward by the sea. The defendant was a manufacturer of *Parker's Roman* cement, for the making of which he had from time to time taken away large quantities of stones from off the sea-beach and shore upon which the plaintiff's manors abutted; some above high water mark, and some between high and low water mark. The plaintiff contended that the space between high and low water mark belonged to him, and proved the exercise of acts of ownership there from time to time. The defendant took the stones as the vendee or agent of a person named *Taylor*, who had an interest in the shore as assignee of three persons named *Lee*, *Harridge*, and *King*, to whom the plaintiff had conveyed the same by lease and release, dated the 27th and 28th of *September*, 1773. The release, which was between those three persons and the plaintiff, who was described as the eldest son and heir at law of *D. Scratton*, deceased, recited, that by lease and release dated the 17th and 18th of *January*, 1770, and by a recovery suffered in pursuance thereof in *Hilary* term, 10 *Geo.* 3, the messuage, tenement or boat-house, sea-grounds, oyster-layings, shores, fisheries, and hereditaments thereinafter

covered with water, or thereabouts, as the same are beaconed, marked, and stubbed out: saving to the grantor, his heirs and assigns, lords of the said manors, all fish-royal, and all wrecks of the sea, flotsam, jetsam, and ligan, within the said manors, and all other manorial rights; to hold the messuage, tenement, or boat-house, sea-grounds, oyster-layings, shores, fisheries, hereditaments, and premises, with the appurtenances, of the grantor, lord of the said manors, by such suit of court, and other services, as were of right and ought to be done and performed by other the freehold tenants of the said manors respectively, seised of estates of inheritance in fee simple." Since the date of the deed the sea had imperceptibly incroached upon the land, and the high and low water marks had varied in the same proportion:—Held, that so much of the soil of the shore as *from time to time* lay between high and low water mark, had passed to the grantee under this deed.

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mentioned, amongst other hereditaments therein comprised, were conveyed and assured, or intended so to be, unto and to the use of the said *D. Scratton* (deceased), his heirs and assigns for ever; and that *D. Scratton* (the plaintiff) had contracted with *Lee, Harridge*, and *King*, for the absolute sale to them and their heirs of the *said* messuage, tenement, &c. for the sum of 6,000*l.* It then witnessed, "that in pursuance of the recited contract, and in consideration of the sum of 6,000*l.* paid as therein mentioned, which was agreed to be the full consideration money for the absolute purchase of the messuage, tenement, &c. he, the said *D. Scratton*, had bargained, sold, released, &c. unto the said *Lee, Harridge*, and *King*, in their actual possession then being by virtue of a bargain and sale made to them, the day next before the date of the release, for one year, and to their heirs and assigns, all that messuage, tenement or boat-house, with the gardens, stables, out-houses, and buildings thereunto belonging, situate at a place called *Southend*, in the parish of *Prittlewell* aforesaid; and also all that and those sea-grounds, oyster-layings, shores and fisheries, of him, the said *D. Scratton*, commonly called and known by the name or names of *Milton*, otherwise *Middleton Hall* and *Prittlewell Priory*, shores or sea-grounds, or by the name of one of them, or by whatever name or names the same were or had been theretofore called or known, situate, lying, and being in the parish of *Prittlewell* aforesaid, or in some other parish or parishes thereunto next or near adjoining, with full and free liberty to and for the said *Lee, Harridge*, and *King*, and their heirs and assigns for ever, to fish, dredge and lay oysters thereon, and from thence to take and carry away the same at their and every of their free wills and pleasures; which said sea-grounds, oyster-layings, shores, and fisheries did extend from the south, at low water mark, to the north at high water mark, and abutted west towards *Leigh* aforesaid, upon the lands or sea-grounds of *E. Tyrrel*, Esq. called *Chalkwell Hall*, and towards the east upon the sea or oyster-grounds of *T. Drew*, Esq. in the said county

of *Essex;* and all which said sea-grounds, oyster-layings, shores and fisheries, thereby granted, released, and conveyed, and mentioned or intended so to be, did contain in the whole, by estimation, 800 acres of land covered with water, or thereabouts, as the same were beaconed, marked, and stubbed out, and were then in the tenure and occupation of the said *Lee, Harridge,* and *King,* their under-tenants or assigns, together with all and all manner of ways, &c. (saving, except, and reserving unto the said *D. Scratton,* his heirs and assigns, lord or lords of the respective manors of *Prittlewell Priory* and *Milton,* otherwise *Middleton Hall,* out of the grant and conveyance thereby made, all and all manner of fish-royal, and all wrecks of the sea, flotsam, jetsam and ligan, within the said respective manors or either of them; and also all and all manner of franchises, royalties, jurisdictions, perquisites, and profits of courts, and all other manorial rights and privileges whatsoever to him the said *D. Scratton,* as lord of the said manors, or either of them, belonging or appertaining, as fully and amply as the same were then used, exercised and enjoyed by him in respect of other the freehold tenants of the said respective manors seised of estates of inheritance in fee simple); and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the said premises, and of every part and parcel thereof, and all the estate, &c.; to hold the said messuage, tenement, or boathouse, sea-grounds, oyster-layings, shores, and fisheries, hereditaments and premises thereby granted or released, or intended so to be, and every part and parcel thereof, with their and every of their rights, members, privileges, hereditaments and appurtenances, unto the said *Lee, Harridge,* and *King,* their heirs and assigns, as to one full undivided third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said *Lee,* his heirs and assigns for ever; and as to one other, &c. to the only proper use, &c. of the said *Harridge,* his heirs, &c.; and as to the remaining, &c. to the only proper use,

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&c. of the said *King*, his heirs, &c.; and to or for no other use, intent, or purpose whatsoever; to be holden as to such part of the said hereditaments and premises thereby granted and released as did lie within the said manor of *Prittlewell Priory*, of the said *D. Scratton*, party thereto, his heirs and assigns, lord or lords of the same manor; and as to such part, &c. as did lie within the manor of *Milton*, otherwise *Middleton Hall*, of the said *D. Scratton*, &c. lord or lords of the same manor; by such suit of court or other services, as were of right and ought to be done and performed by other the freehold tenants of the same respective manors, seised of estates of inheritance in fee simple." It appeared, that since the date of the deed, the sea had gradually incroached upon the land, in the judgment of some of the witnesses, fifteen feet, in the judgment of others much more, and that the high and low water mark had advanced upon the land in the same proportion; and it was proved, though not very distinctly, that the boundaries of the shore on the north and south had been formerly beaconed out. It was insisted for the defendant, that the deed of 1773 had conveyed to the grantees the soil and freehold of the whole of the shore between high and low water mark, wherever those marks might be. It was insisted for the plaintiff, that the deed did not convey the soil and freehold of the shore, but only the privilege of fishing and laying oysters there; and, that even if the deed did convey the soil and freehold, it conveyed only so much of the shore as lay between high and low water mark at the time the deed bore date, and therefore that the plaintiff might clearly recover for all the stones taken by the defendant from any part of the shore above the then high water mark. The learned judge, being of opinion that the deed conveyed no more than a mere privilege of fishing and laying oysters on the shore, directed the jury to find a verdict for the plaintiff, which they did, subject to a reference by consent as to the quantum of damages.

Taddy, Serj. in *Easter* term last, obtained a rule nisi for

a new trial, upon the ground that the learned judge had misdirected the jury upon this point.

Marryat, *Gurney*, *Comyn* and *Andrews*, now shewed cause. There was no misdirection in this case; for, first, the deed conveyed only an easement, a mere right of fishery, or privilege of laying and taking oysters on the shore; and, second, even if it conveyed the soil of the shore, it conveyed the soil of the 800 acres described as bounded north and south by the then high and low water marks, and no more. First, nothing passed but an easement. The deed first grants "all that messuage, tenement, or boat-house, and all those sea-grounds, oyster-layings, shores, and fisheries, called *Middleton Hall* and *Prittlewell Priory* sea-grounds and shores." That is granting a qualified use of the shore for a particular purpose; the word "oyster" must be read as over-riding all the subsequent words: and then the grant is of the oyster-layings, oyster-shores, and oyster-fisheries. The deed then grants a liberty "to fish, dredge and lay oysters, and to take and carry away the same." Now such a liberty was wholly unnecessary, if the soil had already passed, because then the grantee had full right to use it as he chose without any permission of the grantor. The word "sea-grounds," taken by itself, would no doubt pass the soil; but it cannot be so taken: the whole grant must be construed together, and the word sea-ground must be taken to pass such an interest as was necessary for the particular purpose in view, namely, such an interest as would enable the grantee to fish, dredge, lay, and take oysters. As to the reservation of fish-royal, wrecks of the sea, flotsam, jetsam, and ligan, that affords no clue for the right construction of the deed; because, as they are prerogative rights, they would not, under any circumstances pass, except by express words. Secondly, if the deed conveyed the soil, still it conveyed the soil of so much only of the shore as lay between high and low water mark at the period when the deed bore date. The part of the shore intended to be granted is par-

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ticularly described with its abuttals and boundaries, and is stated to "contain, *in the whole*, by estimation, 800 acres of land, covered with water, or thereabouts, *as the same were then beaconed, marked and stubbed out.*" The thing granted, therefore, is a specific quantity of land, lying within certain boundaries, and to be ascertained by certain marks; but the grantee now claims other land, not within those boundaries, and not limited by those marks: and as the defendant was proved to have trespassed beyond those boundaries and marks, the plaintiff is, at all events, entitled to a verdict on that ground. The grantee, in effect, claims a moveable freehold; but there cannot be any such thing as a moveable freehold; it is a thing unknown either in law or in reason, and a deed which professed to grant such an estate would be void in law for uncertainty.

Taddy, Serjt., *Preston* and *Knox*, contrà.—This deed, like all others, must be construed with a due regard to the intention of the parties when they executed it; and then the real question is, what the one intended to grant, and what the other intended to receive. The deed consists of six parts. The first begins with the grant of the "messuage, tenement, or boat-house," and afterwards of the "sea-grounds, oyster-layings, shores, and fisheries," and contains, indeed, all the substantial part of the grant. The second gives "full and free liberty to fish, dredge, and lay oysters, and to take and carry away the same." The third, beginning with the words "which said sea-grounds," and the fourth, with the words "all which said sea-grounds," contain descriptions, the first as to boundary, and the second as to quantity, of the thing granted. The fifth is the exception, reserving to the grantor, as lord, all the manorial rights. And the sixth is the tenendum. What are the premises granted? They are, "the messuage, tenement or boat-house, with the gardens, stables, out-houses and buildings, thereunto belonging; and also all that and those sea-grounds, oyster-layings, shores and fisheries, called *Middleton Hall* and

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Prittlewell Priory shores or sea-grounds." Now, the word "sea-grounds," if it stood alone, would be sufficient to convey the soil; as it has been held that a grant of woods conveys, not only the woods growing on the land, but the land itself also: because the very word "woods," includes both the trees and the soil upon which they grow. *Co. Lit.* 4 b. and *Whistler* v. *Paslow* (*a*). Again, the word "shores," if that stood alone, would clearly convey the soil, because it signifies land covered with water at flood-tide, and left uncovered with water at ebb-tide. *Callis.* 54. Then the words "shores" and "sea-grounds" having a fixed and definite meaning, and being perfectly adequate to the description of the grant, must not be varied or confined by the other unnecessary words "oyster-layings" and "fisheries." The grant is to be construed most strongly against the grantor, and effect is, if possible, to be given to every word of it: but if this deed is construed as contended for on the other side, the word "shores" becomes wholly inoperative. It is said that the grantor intended to convey precisely the quantity of land which he has described in the deed with its abuttals and boundaries, and no more, and therefore that the grant is confined to the space between high and low water mark in 1773; but this latter description was wholly unnecessary, for the subject matter of the grant had been well described before: and where the subject matter of the grant has been once well described, no subsequent description, however erroneous, is allowed to have effect. *Wrotesley* v. *Adams* (*b*), and *Swyft* v. *Eyres* (*c*). The reservation to the grantor of fish-royal, wreck of the sea, flotsam, jetsam and ligan, is strong to shew that he had previously intended to convey the soil; because, if he had conveyed an easement only, such a reservation would have been unnecessary. Then look at the tenendum. The grantee is to hold the boat-house, sea-grounds, and premises, with their appurtenances, of the lord of both manors respectively, "by such suit of court, or other services, as were of right and ought

(*a*) Cro. Jac. 487. (*b*) 1 Plow. 191. (*c*) Cro. Car. 546.

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to be done and performed by other the freehold tenants of the said respective manors, seised of estates of inheritance in fee simple." This tenendum clearly applies to the oyster-grounds, as well as to the boat-house, because the mode of tenure is reserved in respect of both manors; the oyster-grounds being within one, and the boat-house within the other. Every feoffee must, by the statute of *Westminster* 2d, 13 *Edw.* 1, hold the land of the chief lord of the fee, and by the same suits and customs as his feoffor had held; and, therefore, as an incorporeal hereditament, or easement, does not lie in tenure, it is plain from the words of the tenendum here, that the *lands* lying between high and low water mark were to be held: although, by force of the statute, they could only be held of the chief lord, and not of the grantor as mesne lord. Then if the deed conveyed the soil in the land, the only question is, whether that land is to be limited by the high and low water marks as they were in 1773, or whether it is to be extended to those marks as they are at present. It has been said, in support of the former proposition, that the law knows no such thing as a moveable freehold, and that a grant of such an estate would be uncertain and void. But Lord *Coke* is an authority to the contrary, for he says (*a*), "Where a man hath a *moveable* estate of inheritance, for example, in thirteen acres: the question is, where livery shall be made. First, if they be parcel of a manor, they may pass by the name of the manor, but if they be in gross, then the charter of feoffment must be of thirteen acres, lying and being in the meadow of eighty acres." These words are somewhat obscure, but their meaning is perfectly plain, namely, that if a man has a moveable freehold in thirteen acres of land, part of a meadow of eighty acres, he may convey it by the description of thirteen acres, lying within eighty acres. Upon that authority, it may safely be assumed, that there may be a moveable freehold, and that it will pass by a description such as that in the present deed; and then it follows, that in this case every

(*a*) Co. Litt. 48 b.

thing passed that it was the intention of the parties should pass. Now, looking at the deed altogether, it is evident that the grantor intended to convey all the interest that he had himself derived from the crown. But land formed by the sea by slow, gradual, and imperceptible accretion, belongs, primâ facie, to the crown, or to its grantee, *Rex* v. Lord *Yarborough* (a), and the authorities there collected; therefore, as the shore between high and low water mark in this case has been slowly, gradually, and imperceptibly altered, as the evidence clearly shewed, the shore so altered belonged first to the crown, next, as a matter of course, to its grantee, and lastly, by force of this deed of 1773, to the person under whom the present defendant claims.

BAYLEY, J.—If we are satisfied upon the construction of this deed, that the general right in the soil between high and low water mark has passed to the grantee, the present verdict, being a general verdict for the plaintiff, cannot be supported. I am of opinion that the deed has conveyed not a mere easement, but the soil, at least as far as the surface is concerned. This being land between high and low water mark, the property in it, primâ facie, is in the crown; but it may be in a subject, and where it is, various rights may vest in the subject in respect of it, according to the terms of the grant. The crown may have granted the soil itself, or a general liberty to fish, or a particular liberty to lay, keep, and take oysters on it; so that the rights of the grantor in this case must depend upon the rights which were granted to him by the crown. If he meant to convey all that he had received, and the extent of his rights was doubtful, he would frame his deed accordingly, and would insert in it words calculated to embrace every species of interest which he could by possibility possess. The deed professes to grant "all that and those sea-grounds, oyster-layings, shores and fisheries." The word "sea-grounds," alone, would, primâ facie, have operated to pass the soil;

(a) Ante, Vol. IV. 790.

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because, generally speaking, the word *ground* includes the soil, as the word *wood* includes the soil upon which the wood grows. The word "oyster-layings" follows immediately after "sea-grounds;" but does that limit the meaning of the word "sea-grounds," and shew that nothing but the privilege of laying and taking oysters was intended to be granted? I think not; I think it was introduced to extend and not to narrow the grant, and was thought necessary because the grantor was doubtful what rights he had himself derived from the crown. Then comes the word "shores," which is quite inconsistent with the idea of an easement; for, it passes the soil itself, nay, it *is* the soil itself. That again is followed by the word "fisheries," but that seems to me, for the reason already given, to have no restraining operation, but to have been introduced merely ex abundanti cautelâ for the benefit of the grantee. The words *sea-grounds*, *oyster-layings* and *shores*, are extremely strong in themselves, and it would require equally strong, as well as perfectly clear and express words, to control or qualify their effect; that, cannot therefore, be done by the word *fishery*, which, if it is not plainly meant to enlarge instead of limiting the grant, is at most a word of equivocal import, and cannot operate to restrain former words which have a certain and definite meaning. The "liberty to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same," is open to the same observation; it was unnecessary, but it was put in from caution: and the argument founded upon it for the plaintiff certainly does not apply, because it was equally unnecessary whether the former part of the grant had passed the soil, or an easement only. Then comes the exception, which, so far as it respects fish-royal, might be important, because the previous grant of the fishery might, but for such an exception, have included them; but as it respects wreck of the sea, flotsam, &c. it is perfectly useless, because those being prerogative rights would not pass under any grant without express words for that purpose. Upon the whole of this deed I am of opinion, there-

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fore, that it does pass, not a mere easement or privilege only, but the soil itself, and then the question is, what soil does it pass? The limits upon the east and west are not disputed; the contest is as to those upon the north and south. It has been contended on the part of the plaintiff that there cannot be a moveable freehold, and therefore that the deed cannot convey the soil which is from time to time varying as the high and low water marks which are its boundaries vary, but only that soil which was bounded by the high and low water marks at the time when the deed was executed. The passage cited from *Co. Litt.* 48 b. shews, however, that there may be a moveable freehold; and the very situation and nature of this land shew that the only interest a party can have in it, is a moveable interest. The land between high and low water mark originally vested in the crown; it could vest in a subject only by means of a grant from the crown: and the crown by such a grant must of necessity convey, not that which at any one time constituted the space between those termini, but that which might from time to time, hereafter, constitute that space, and the grantee of a freehold so granted would possess a freehold, moveable, varying, and shifting, according as the sea incroached upon or receded from the land. Here, the object of the parties to the deed was to grant the land within certain boundaries, those on the east and west being ascertained and stationary, and those on the north and south being moveable and to be ascertained by the high and low water marks from time to time. Such a grant must be construed with reference to the common law upon the subject of accretion, and the property conveyed by it must be held to shift as the high and low water marks themselves shift. For these reasons I am of opinion that the plaintiff had no right to recover for any of the stones taken between high and low water mark, and that the verdict, therefore, was given for too much, and the rule for a new trial ought to be made absolute.

HOLROYD, J.—I am also of opinion that the right to the

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soil passed by this deed. The grant must be taken to operate, first, as a conveyance of corporeal hereditaments, (supposing that the grantor had the right to convey such,) and second, as a conveyance of incorporeal hereditaments. Whether the grantor had, or had not that right, the words "with liberty to fish," &c. may, as it seems to me, have been inserted, in order to bar the possibility of doubt as to the nature and extent of the rights granted. The right in the soil, and the right of fishery, may have existed in different persons before they both vested in the grantor; and it may, consequently, have been matter of doubt, whether or not the one had merged in the other. But, at all events, I think the additional words are words not of restriction, but of enlargement; that they were used in the latter sense, and must be so construed. The deed recites that there had been a recovery suffered of, inter alia, the messuage, tenement, or boat-house, sea-grounds, oyster-layings, shores, fisheries, and hereditaments, thereinafter mentioned; that they were comprised in a settlement there referred to; and that the grantees had agreed for the absolute sale to them of the same. If they were corporeal hereditaments, the recovery would operate upon them, and they might have been demanded in a præcipe; but if they were not, the recovery would not operate upon them, and they would only pass as appurtenances. Then comes the granting part of the deed, which contains words clearly descriptive of corporeal hereditaments, and those words must not be narrowed or restrained by any subsequent words, unless we see a palpable intention in the parties so to do. The liberty to fish was altogether unnecessary, whether the soil or only an easement had passed; but was probably introduced as a proper matter of caution, in case any doubt should arise whether the right of fishing still existed distinct from, or had merged in, the right to the soil. Which portion of a grant stands first, and which last, in the deed, is not very material; and a grant of "liberty to fish, dredge and lay oysters, together with the sea-grounds," would have operated

as a grant of a corporeal hereditament. The grantees are to have "all the rents, issues, and profits, of all and singular the premises," not merely the profit arising from the fishery; so that the grantor uses sweeping and extensive words throughout, evidently denoting his intention to convey every thing that he had, and clearly, in my opinion, sufficient for the conveyance of the right to the soil. Then, if the soil has passed, the grantee must, as a matter of course, stand in the same situation, with respect to the soil, as the grantor would have done, if he had never executed the deed. The grantor conveyed all the shore within particular boundaries; nothing, therefore, remained in him: the grantee stood in his situation, and the accretion followed as an accessary to the principal. The change being gradual, the accretion becomes part of the shore, and must, of course, belong to him who has the shore when the accretion takes place.

LITTLEDALE, J.—I am of opinion that by this deed the soil passed, not only of the 800 acres therein described, but of all other land between high and low water mark which has since been gradually and imperceptibly added. It is quite clear that if the word "sea-grounds" alone had been used, the soil would have passed under it; because as sea-ground is ground either bordering on the sea, or covered by it, and the word "ground" alone would pass the soil, the word "sea," which is added only to denote its situation, cannot vary its operation. The word "shores," taken alone, would as clearly convey the soil, but it is said that both these words must be coupled with the word "oyster," and that a grant of oyster-grounds, or oyster-shores, is a grant of a right of fishery only, and not of a right of soil. I see no reason why the words should be thus coupled, but when they are, the effect supposed is not produced, for there is still a ground or a shore, and either of those would pass the soil, for in fact they *are* the soil; and the prefix would only denote the purpose to which the land was applied, namely,

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the fishing for oysters, precisely as the words arable, pasture, or wood, prefixed to land, denote the purposes to which the land is applied. So, with respect to the word "fisheries," I see no reason why the word oyster should be coupled with that, for there is no necessary connection between them. It is said that the grant of the fishery is unnecessary, because if the soil passed, the fishery passed also. I apprehend that is not so in this case. A fishery in a river would pass by a grant of the adjoining land, because it might of common right be incident to the soil. But an exclusive right to fish between high and low water mark would not pass by a grant of the soil, because the public have a right to fish there. The fishery, therefore, would not pass even under the word *soil*, and though the soil did pass by the deed, the introduction of the word *fishery* was still necessary in order to give the privilege of fishing. Neither would the word oyster-layings necessarily pass the right to fish; for that word imports only the privilege of depositing oysters there, and it might be a matter of doubt whether it gave the right to take them. But the deed describes them as "all those sea-grounds, oyster-layings, &c. called and known by the names of *Middleton Hall* and *Prittlewell Priory shores or sea-grounds;*" referring, therefore, to shores having particular names, and shewing that those are the same shores previously granted. Then comes the "liberty to fish," &c. and even if that was unnecessary, still it cannot be construed in restriction of the grant, but only in explanation of the intention of the parties; as was laid down in the late case of *The Earl of Cardigan* v. *Armitage* (*a*). Then the exception does not bear at all upon the case, unless with respect to "fish-royal," and those it was necessary to except, for otherwise they would have passed with the fishery, as an exception always implies, that but for that exception, the thing was before granted. Then, as this is a grant of the soil, the remaining question is, whether it is confined to the 800 acres described in a subsequent

(*a*) Ante, vol. iii. 414.

part of the deed. It is a well known and sound distinction, that where a deed in the first instance contains words sufficient to pass the property, they shall not be affected by subsequent words of suggestion or affirmation, even though those subsequent words may be wrong in point of description: so here, the words, "which said sea-grounds," &c. describing their boundaries, "do contain, on the whole, by estimation, 800 acres of land covered with water," which are a mere suggestion or affirmation, and which may be true or false, cannot vitiate the former grant, which clearly extended to those very sea-grounds. Then, as the soil between high and low water mark is granted, it is granted subject to the variations made in it by corresponding variations in the tide. It is the grant of a shifting soil, and the accretion having been imperceptible, it is clear, upon the authority of *Rex* v. *Lord Yarborough*, and of Lord *Hale's* treatise De Jure Maris, that that continued to pass as part of the soil which had vested in the grantee.

Rule absolute for a new trial; the amount of damages referred to a gentleman at the bar.

COTTERELL v. HOBBY.

First count, in case, for injuring plaintiff's reversion in land, by cutting and carrying away branches from trees growing on it. Second count, in trover, for the branches.

Proof, that plaintiff demised the land to a tenant by a written agreement, *not produced*; and that defendant carried away some branches, *the value of which was not shewn*:— Held, that plaintiff could not support the first count without producing the written agreement; but, that on the second count, he was entitled to *nominal* damages.

CASE for an injury to plaintiff's reversion. The first count stated, that at the time of committing the grievance, &c. a certain close, situate &c. was in the possession and occupation of one *Morgan*, as tenant thereof to plaintiff, the reversion thereof then and still belonging to plaintiff, and that defendant cut certain branches off certain trees then standing and growing upon the said close. Second count, trover for timber. Plea, not guilty. At the trial before

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Garrow, B. at the last *Lent* assizes for the county of *Hereford*, *Morgan*, the person named in the declaration, was examined on the part of the plaintiff, and proved that he occupied the close in question as the plaintiff's tenant, under a written agreement (which was not produced,) and that the defendant had lopped some of the trees growing in the close, and had carried the branches away. No evidence was given of the value of the branches. It was objected on the part of the defendant that the written agreement mentioned by *Morgan*, and under which he held, ought to have been produced, and that in the absence of it, there was nothing to shew that the reversion in the trees belonged to the plaintiff. The learned judge overruled the objection, and the plaintiff obtained a verdict, generally, damages 5*l*.

Campbell, in *Easter* term, obtained a rule nisi for entering a nonsuit, upon the objection taken at the trial.

W. E. Taunton and *W. O. Russell* shewed cause. The evidence of *Morgan* established the fact that he held the close as tenant to the plaintiff, and that was sufficient to maintain the action. The terms of the tenancy were not in issue; therefore no proof of them was required. In the absence of proof to the contrary, it must be presumed that the trees were demised with the close; and if the trees were excepted out of the demise, that was a fact for the defendant to shew: *Doe* v. *Morris* (*a*). But, at all events, the verdict is supportable upon the count in trover, because to that the objection does not apply. This rule, therefore, must be discharged.

Campbell, contrà. The count in trover will not support the verdict. It was a general verdict. It was not confined to the count in trover, nor was that count relied on at the trial; nor was there the slightest evidence of the value of the timber, so as to justify an award of 5*l*. damages. Then,

(*a*) 12 East, 237.

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with respect to the first count, the plaintiff clearly ought to have been nonsuited. It was proved that the close was held under a written agreement, and without the production of that document, there was no legal evidence that the trees were included in the demise, or, consequently, that the reversion in them belonged to the plaintiff; and if the trees were excepted out of the demise, the result is the same, for then the form of action ought not to have been case, but trespass. In either view of the case, therefore, this rule must be made absolute.

BAYLEY, J.—It is a plain rule of law that you cannot give parol evidence of the contents of a written agreement which is still in existence. Here, as it was proved that *Morgan* held under a written agreement, the terms of his tenancy could only be proved by the production of the agreement itself; therefore, I am of opinion that the verdict is not sustainable upon the first count: but the second count, in trover, I think, does sustain the verdict, for that count was sufficiently proved without the production of the agreement. The trees equally belonged to the plaintiff whether they were excepted out of the demise or not: and as the defendant clearly converted to his own use some of the branches, it seems to me that the plaintiff is entitled to recover. The damages, however, must be nominal, because no value was proved; therefore let the rule for entering a nonsuit be discharged, and the damages be reduced to one shilling.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule discharged, and the damages reduced accordingly.

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The KING *v.* The INHABITANTS of HAMBLEDON.

Where several parishes, incorporated under the 22 *G.* 3. c. 83, have a common poor-house, an appointment of a governor by one of those parishes only, is bad. Service as governor of such a poor-house, even under a good appointment, would not confer a settlement; for the 22 *G.* 3. c. 83, does not constitute the office of governor a public office, and s. 39 provides that nothing in the act contained shall alter or affect the settlement of any person.

ON appeal against an order of two magistrates for removing *John Birdseye* from the township of *Witney*, in *Oxfordshire*, to the parish of *Hambledon*, in *Surrey*, the sessions confirmed the order, subject to the opinion of this Court upon the following case:

In the year 1786 the parishes of *Brumley*, *Chiddingfold*, *Dunsfold*, and *Hambledon*, were incorporated under the provisions of the statute, 22 *Geo.* 3. c. 83. The parishes of *Haslemere*, *Shalford*, *Saint Martha*, *Hascomb*, and *Elstead*, afterwards took the benefit of the same provisions; and all the parishes before mentioned became incorporated and united parishes under and for the purposes of that statute. About the year 1787 a very large house of industry was erected by contribution of all those parishes upon the waste of the manor, in the parish of *Hambledon*, as the most convenient situation for the purposes of the incorporation. To this house paupers from all the united parishes were sent by those parishes respectively, as occasion required, and were maintained separately, at the expense of the respective parishes to which the paupers severally belonged. For the management of this general house of industry, and the employment of all the classes of paupers therein, a governor was from time to time appointed, under the powers of the statute. In the year 1820, *John Birdseye*, who had gained a settlement at *Witney*, in *Oxfordshire*, before the date of the statute, was appointed governor of the house of industry, by an order in the following form:— "*Surrey* sessions. We, two of his Majesty's Justices of the peace for the county of *Surrey*, acting for the hundred of *Godalming*, in the said county, do hereby appoint *John Birdseye*, of *Hambledon*, to execute the office of governor of the poor, *for the parish of Hambledon*, within the said

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hundred, for one year, to be computed from the week of *Easter* now last past, to which he has been recommended at a public meeting, holden the 29th day of *March* last, pursuant to the directions of the statute passed in the 22 *Geo.* 3, for the better relief and employment of the poor. Given under our hands and seals this 6th day of *April*, 1822, *G. W. O.*, *J. M.*" Under this appointment he served the said office of governor for three years in succession, upon the same terms, and during that time resided in the parish of *Hambledon*. The questions for the opinion of the Court are, whether *John Birdseye* was duly appointed to a public annual office, according to the provisions of the statute; and whether, by his service of such office in the parish of *Hambledon*, he gained a settlement there.

G. R. Cross, in support of the order of sessions. Two objections will be raised to this settlement. First, that the office of governor of the poor is not a public annual office within the meaning of the statute 3 and 4 *W*. 3. c. 11. s. 6; and second, that by the provisions of the statute 22 *Geo.* 3. c. 83. s. 39, no settlement can be gained by serving any such office under that statute. As to the first, the statute 22 *Geo*. 3. c. 18, expressly describes the situation of the governor as an office; such an office can hardly be denied to be public in its nature: and it is clearly annual by the very terms of the appointment. The appointment is, indeed, for one year, to be computed from a by-gone day, but the pauper served three years in succession under it, upon the same terms, so that there was a continuous service for three years, at the same rate of payment, and under the same original appointment. Secondly, section 39 of the statute enacts, " that nothing therein contained shall extend, or be construed to extend, to alter or affect the settlement of any person or persons whomsoever, or to give any illegitimate child, who may be born in any poorhouse or workhouse, established under the authority of this act, a settlement in the parish or place in which such poorhouse or workhouse

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but every such child shall be considered as settled in the parish or place to which the mother belonged." Now it is perfectly clear that that clause was intended to apply exclusively to paupers residing as such in the poorhouse, and not to comprehend the servants or officers belonging to the establishment. That seems plain from the provision respecting illegitimate children, and from a similar provision in the former statute of 9 *Geo.* 1. c. 7. s. 4, which enacts, "that no poor person or persons, his, her, or their apprentice, child, or children, shall acquire a settlement in the parish, town, or place, to which he, she, or they are removed by virtue of this act." The object of both these enactments is the same, and seems evidently to apply exclusively to persons brought into the parish compulsorily, and not to persons situated as this pauper was. Upon both points, therefore, it is submitted, that the order of sessions must be confirmed.

Nolan, contrà. There is a third objection, namely, that *this was not a valid appointment.* The pauper was appointed for one of the incorporated parishes; he ought to have been appointed for them all. That is clearly a fatal objection. (Here the Court stopped him).

Bayley, J.—The last objection is decisive of the case: the appointment for one parish is clearly bad. But it seems to me that the other objections are fatal also. It has been decided that the situation of master of a workhouse is not a public office, unless it is so constituted by an act of parliament; *Rex* v. *Mersham* (*a*); consequently, previous to the passing of the 22 *Geo.* 3. c. 83, no service in such a situation could have conferred a settlement. It is true, that statute calls it an office, but the 39th section provides that nothing contained in the statute shall alter or affect the settlement of any person; therefore it leaves the office just what it was before, and a settlement cannot be gained by

(*a*) 7 East, 167.

service under it. Upon all these grounds, therefore, it seems to me, that the order of sessions ought to be quashed.

Holroyd, J. and Littledale, J. concurred.

Order of sessions quashed.

The King v. William Boldero, Clerk.

Where the tithes of a parish were extinguished by act of parliament, and in lieu thereof certain annual *corn rents* issuing out of lands in the parish were substituted, payable to the rector quarterly, with a power of distress and sale to enforce payment:—Held, that the money, when paid, was rateable to the poor in the hands of the rector.

On appeal by the Reverend *William Boldero*, clerk, against a rate made for the relief of the poor of the parish of *Carlton cum Willingham*, in the county of *Cambridge*, the sessions confirmed the rate subject to the opinion of this Court upon the following case :—

The appellant in his notice stated the ground of his appeal to be, that he was assessed for property which by law was not rateable, viz. the sum of 422*l.* 14*s.* 7¾*d.* for corn rents as compositions for tithes. In the year 1799 an act, which is to be considered as part of the case, was passed for inclosing the said parish of *Carlton cum Willingham*. From the time of passing the said act until the present rate was made, neither the appellant (who for some years has been the rector and an inhabitant of the parish) nor his predecessors had been rated for the corn rents except twice. One of which rates made in 1816 was appealed against and quashed by consent on account of the informality, and the other of which made in 1817 (being appealed against) was quashed upon hearing by the Court of Quarter-Sessions, who refused a case to the respondents for the opinion of the Court of King's Bench. If the Court should be of opinion that the said corn rents are by law rateable the order of sessions is to stand, but if not then the rate to be amended by strking out the said sum of 422*l.* 14*s.* 7¾*d.* (*a*).

In the year 1799, the act of parliament mentioned in the

(*a*) There was another question stated in the case, but not being the subject of argument nor of adjudication, it is unnecessary to state it.

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case was passed for the purpose of inclosing the parish of *Carlton cum Willingham*, and exonerating the same from tithes by a corn rent to be payable for the same, in which act is a clause, which, after reciting, that it had been agreed that the tithes of the said parish should cease, and that in lieu thereof certain yearly sums of money should be paid to the rector, directed the commissioners therein named to ascertain the annual value of the lands in the parish subject to tithes, and also what yearly sum would be equal to one fifth of the value of the arable lands, &c., and also to ascertain the proportions of the said yearly sum to be charged on each proprietor's estates *as a yearly rent payable thereout*, to the rector in lieu of the tithes, and should set forth the several particulars so ascertained by their award; and by the same clause the rector is empowered to *distrain for non-payment of the same*. By the next clause a mode is directed of re-ascertaining the corn rent according to variation in the price of wheat by referees to be appointed by the Court of Quarter-Sessions. The clause following directs, that all tithes arising and growing due in the parish should cease and determine from the commencement of the payment of the corn rents. The commissioners by their award, which was executed the following year, ascertained the amount of the corn rent to be charged on all the lands in the parish to be 250*l.* 4*s.* 6*d.* and that 5*s.* 8½*d.* was the average price of a bushel of wheat within the county of *Cambridge* for the preceding twenty-one years, and they directed the value of certain specific quantities of wheat to be issuing and paid out of each allotment made to the several proprietors. After which the allotment proceeded as follows:—"Which said yearly rent or annual sum of 250*l.* 4*s.* 6*d.* is by the said act charged upon, and directed to be issued and payable out of all the said lands and grounds in and by the said act mentioned to be divided, allotted, and enclosed, and exonerated from tithes respectively, in such proportions at such times, in such manner, and under, and subject to such variations and appointments, and with such powers and

remedies for recovering and enforcing the payment thereof, as in and by the said act is expressed and provided; and for the better and more effectually securing the due and regular payment of the said yearly rent or annual sum of 250*l.* 4*s.* 6*d.* to the said *D. B.* and his successors, rectors at *Carlton cum Willingham* aforesaid, we the said commissioners, in further pursuance of the directions of the said act, do hereby charge and make chargeable all and every the lands, hereditaments, estates, and premises of all and each of the said several proprietors of lands and estates in the said parish of *Carlton cum Willingham* aforesaid, which are by the said act intended to be divided, and inclosed, and exonerated from tithes respectively, with the yearly payment and discharge of the said several sums of money set opposite to their respective names in the schedule next hereunder written. (Here followed the schedule of proprietors, with the quantity and value of their estates, and the quantity of wheat and amount of money payment to be made from each estate in respect of the tithes). Which said several sums so as above charged and made payable by and out of each specific part of the several lands and estates of the several and respective owners and proprietors whose names are in the above schedule mentioned and ascertained, we do, in further pursuance of the directions of the said act, hereby order, direct, and appoint and award shall be paid and payable to the said *D. B.* and his successors, rectors of *Carlton cum Willingham*, at the rectory house of the said parish, by four equal quarterly payments in every year, on the several days and times following, &c., with such remedies and powers for recovering and enforcing the payment thereof, and apportioning the same rent upon a division of the lands and grounds charged with the payment thereof by sale or otherwise, &c. as in and by the said act is mentioned and provided and declared concerning the same."

Nolan and *H. C. Robinson*, in support of the order of sessions, were stopped by the Court.

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Marryat and *Gurney*, contrà. The question for the decision of the Court is, whether the corn rents when paid into the hands of the rector in lieu of tithes are rateable to the relief of the poor. It is submitted that they are not, on either of two grounds, first, that by operation of the statute referred to in the case, the tithes must be considered as let for a term of years to the occupiers of the lands, and therefore, according to decided cases, are rateable in the hands of the latter only; or second, that they are to be considered as *rents* issuing out of lands, in which case, as rents, they are not rateable. Now, first, by the operation of this act, certain corn rents are payable to the rector by the occupiers of the lands in lieu of tithes for a certain number of years, during which no variation is to be made in the amount. The act therefore may be construed as a lease of the tithes. Where the parson leases his tithes, his liability to be rated ceases, although the rule would be otherwise if he merely lets by parol, and allows the tenant of the land to retain them. In *Rex* v. *Lambeth* (a) the parson let the tithes, and the lessee allowed the occupiers of the land to retain, and the Court held that the farmers of the tithe were to be rated, but they added, "It is true it might be otherwise if an under lease had been made thereof." There is some slight difference between the language of the 43 *Eliz.* c. 2. and the General Highway Act, 13 *Geo.* 3. c. 78. s. 34.; but in *Rex* v. *The Justices of Buckinghamshire* (b), the Court doubted whether a rector who lets his tithes even by parol to the occupiers of lands in respect of which the tithes arise, and receives a half-yearly composition in the nature of *rent*, can be considered as an 'occupier of tithes within the meaning of the Highway Act. Since then the case of *Chatfield* v. *Ruston* (c) has been decided, in which a corn rent had been given to the vicar, under an inclosure act, in lieu of tithes, "free and clear of all rates, taxes, and deductions whatsoever," and the Court held, that by operation of those words the vicar was

(a) 8 Mod. 61. S. C. 1 Stra. 525. (b) Ante, vol. ii. 689.
(c) Ante, vol. v. 675.

exempted from the poor's rate. It is true that in the present case the act of parliament does not contain such express words of exemption, but, as it is manifest that the object of the act was to give the clergyman a compensation in lieu of tithes, which being fixed and permanent in amount, it must be understood that the money when paid was to be free from any deductions in the shape of rate. Assuming it, however, to be doubtful whether this construction can be given to the act, then, secondly, at all events, it is clear that these are *rents* issuing out of lands, and are therefore not rateable. Strictly and technically speaking these are rents. The act of parliament studiously calls them rents; and from the manner in which they are to be first ascertained and then apportioned amongst the land-owners, they possess every character of rents both in name and substance. The act of parliament directs the commissioners to ascertain the annual value of the lands in the parish subject to tithes, and also what yearly sum would be equal to one-fifth of the value of the arable lands, &c. and also to ascertain the proportions of the said yearly sum to be charged on each proprietor's estates *as a yearly rent payable thereout* to the rector in lieu of tithes. Nothing can be more express and unequivocal than this. Instead of his having to look to the land as heretofore for the payment of his tithes, the legislature gives the rector a corn rent as an equivalent. But the act does not stop there, for a power is given to the rector of enforcing the payment of the corn rents by distress and sale, so that he stands precisely on the same footing with a landlord. The commissioners, in estimating these corn rents, look to the value of the land, not merely with respect to the net rent paid by the tenant, but the value of it subject to such levies and payments to which he would by law be liable. He would be liable to the poor's rate, and in this would be included the rate payable in respect of the tithes. This was the principle recognized in *Rex* v. *The Hull Dock Company* (a). The corn rents, therefore, thus secured to the

(a) Ante, vol. v. 359.

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rector in lieu of tithes are ascertained with reference to the amount of poor's rate which the tenant would have to pay for his land, including the value of the tithes and the poor's rate thereon. The rector would not have an equivalent if he was still liable to tithes; but as the commissioners ascertain the value of the land subject to the payment of the poor rate, it is clear that the rector cannot be rateable. They relied on *Rex* v. *Toms* (a), and endeavoured to distinguish the present case from *Lowndes* v. *Horne* (b) and *Rann* v. *Pickering* (c).

Bayley, J.—It is perfectly clear that by the 43 *Eliz.* c. 2. the parson, or vicar, is rateable to the poor in respect of his tithes, and that for that purpose it is not necessary to shew that he is an occupier of lands in the parish. The question in this case arises upon an act of parliament which passed in the 39 *Geo.* 3. Before that time the cases referred to of *Lowndes* v. *Horne*, *Rex* v. *Toms*, and *Rann* v. *Pickering* were decided. The short principle to be collected from those cases is, that if, by an inclosure act, a sum of money is given to the rector or vicar in lieu of tithes, the money so substituted will continue rateable to the poor, on the same principle that the tithes themselves were before, unless there are express words of exemption in the act to remove that rateability. Now in this case there are no express words to that effect. But it is contended, that from the provisions of this act we may collect it to have been the intention of the legislature that the sums of money, when paid to the rector in lieu of tithes, were to be exonerated from the payment of poor's rate. Upon looking, however, to the language of the act, and the nature of the subject, I draw a very different inference. I am of opinion that the intention of the legislature as expressed by the act was, that the corn rents should be liable to the same burdens to which the

(a) 1 Doug. 401. (b) 2 Sir W. Bl. 1252. 1 Bott, 156. pl. 156.

(c) 1 Bott, 162. pl. 190. See *Rex* v. *The Bishop of Rochester*, 12 East, 353.

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tithes in lieu of which they are substituted would have been previously liable in the hands of the rector. I do not look to the name by which the substituted payment is called, though it may be designated by the name of rent. The thing itself is described to be a yearly rent given in lieu of tithes, but it is not entitled to the legal character of rent to all intents and purposes. In the ordinary sense rent is issuable out of land, and payable to the proprietor of the land, in respect of which certain rights and remedies are given by law. This, however, is merely a money payment, and the act of parliament makes certain provisions as to the mode by which it shall be recovered, which, it is true, puts the rector on the same footing as a landlord, with respect to his right of recovery and enforcing the payment of rent; but let us see whether there is any thing in this act from which it can be inferred that it is to be exempt from the payment of poor's rate. The statute enacts that all the tithes shall cease and be extinguished, and that in lieu thereof certain yearly rents or sums of money shall be paid to the rector in the manner thereinafter mentioned. Now that which is paid to the rector must in his hands be liable to the same burdens to which the tithes for which it is substituted would have been before liable. The tithes would, but for the passing of this act, have been liable to rates, and therefore primâ facie, the sum payable to the rector in lieu thereof ought to contribute to the poor's rate also. And then comes that upon which the stress of the argument rests, namely, that the commissioners "shall ascertain and determine the annual value of the lands in the parish subject to tithes, and also what yearly sum shall be equal to one fifth of the value of the arable lands, and also shall ascertain and determine the proportions of the said yearly sum to be charged on each proprietor's estates, as a yearly rent payable thereout to the rector in lieu of the tithes." It is said that in ascertaining the annual value of the lands, the commissioners must be considered as deducting the amount of the poor rate to which such lands would be liable, and therefore

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inasmuch as the rector will thereby get so much less in yearly payment by this mode of calculation, he is not liable to contribute to the poor rate in respect of that yearly sum. I, however, do not see the force of that argument. In ascertaining the value of land for the purpose of rating, the rule is not to deduct the whole of the poor rate but an aliquot part only. Before the passing of this act, the land in the parish would be liable to the payment of a certain amount of poor's rate, part of which would be paid by the occupiers of the land, and the remainder by the rector in respect of his tithe. I agree that in estimating the value of the land for the purpose of rating, the amount of poor rate payable by the tenant, and also by the rector for his tithe, is deducted, and that upon the residue of the valuation the apportionment of the rate is made. But in making that deduction the amount of property which remains rateable, as respects the tenant, has relation only to the amount of poor rate which he would have to pay, but that portion, in respect of which the rector would have to contribute, remains still liable to be rated in his hands. For instance, if the whole annual value of the land be 500*l.* and the tenant's poor rate amounts to 100*l.*, and the rector's to 20*l.*, the whole 120*l.* is deducted and the residue is rated in the hands of the tenant, but still the rector's 20*l.* continues rateable, for otherwise the tenant would have to pay the rector's rate, which is not the case. I therefore think that the terms on which the commissioners are to ascertain the annual value of the land do not at all vary the obligation of the rector to contribute to the poor's rate in respect of the annual sum he receives in lieu of tithes. If he had intended to exempt himself from the payment of the poor's rate upon these corn rents, he should have made his bargain for that purpose at the time the act was in contemplation; but there is not a single expression in the act which indicates an intention to exempt him from his liability to contribute to the parish rates. Here the money payment stands exactly on the same footing that the tithes in kind would have stood before they were

extinguished, and therefore I think that the money payable to the rector in lieu of tithes is rateable in the hands of the rector in the same way as the tithes themselves would have been. I am of opinion that the sessions have done right in confirming the rate.

Holroyd, J.—I am also of opinion that the sessions have done right in confirming the rate upon these, which are called corn rents, or annual sums of money, paid as a composition to the rector in lieu of tithes. I take it to be an unquestionable proposition of law, not only that tithes in the hands of a clergyman, but that compositions in lieu of tithes are rateable to the poor. But it is said in this case that the occupiers of the land are to be considered as the occupiers of the tithe upon lease, and that the money which they pay to the rector eo nomine as rent, is exempt from poor's rate in the hands of the rector. Undoubtedly, rent reserved by a landlord from land occupied by his tenant is not rateable to the poor, but it does not follow that because such rent is not within the operation of the statute 43 *Eliz.* c. 2. therefore a compensation in lieu of tithes is not rateable, though it may be called by name a rent. As a general proposition of law, a compensation in lieu of tithes is rateable; and I think the occupier of the land who pays the composition is not to be considered as having a rateable occupation of the tithes though he is allowed to retain. By this act of parliament the tithes of the parish are expressly extinguished, and therefore whatever question might arise, if the tithes still continued to exist and remain in the hands of the landholder, he paying an annual rent to the rector, as to whether the latter or the former would be liable to the rate, does not now arise. An obligation is here imposed upon the occupiers of the land to pay the rectors a certain annual corn rent, which is expressly stated to be in lieu of tithes. It is true the payment is called an annual *rent*, and an express power is given to the rector of enforcing the pay-

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ment of it by distress, in the same manner as rent may be recovered as between landlord and tenant; but it does not follow that because such a power is given, the money when paid is to be exempt from the payment of parochial rates. I think the general rule of law attaches upon a compensation in lieu of tithes, and that although it be called rent, still no exemption arises from that circumstance.

Littledale, J.—I am of the same opinion. By the statute 43 *Eliz.* c. 2. the liability to pay poor's rates attaches upon every parson or vicar in respect of his tithes. In this case, though the compensation given to the rector is called rent, yet inasmuch as it is given in lieu of tithes, I think it is as much rateable under the statute as if he had received the tithes in kind, unless there were some express words of exemption in the local act of parliament. It is urged that these are called *rents*, and inasmuch as rents issuing out of land are not by law the subject of rate, therefore they are not rateable in this case. But I am of opinion that whatever this act of parliament calls them is not to govern the question of rateability; we are to look to the substance and not to the name of the thing. In common parlance these payments are called corn rents, but it does not follow that because the word "rents" is used, all the qualities and circumstances which belong to the legal definition of a rent will attach, so as to exempt them from rateability. I am of opinion, therefore, that these corn rents, being expressly substituted in lieu of tithes, without qualification, are not exempt from poor's rate, and consequently that the order of sessions must be confirmed.

Order of sessions confirmed.

Lewis *v.* Griffith Bowen Jones.

Where a creditor signed an agreement to accept a composition of so much in the pound in full of his demand, on having a joint note from the debtor and his father, and accordingly received a joint note for the composition on his debt:— Held, first, that this was an accord and satisfaction of the original debt, and that the indorser of a promissory note by which the debt was originally secured, could not be sued for the residue of the plaintiff's demand; and second, that parol evidence was inadmissible to shew that the plaintiff had been induced to sign the composition deed by a misrepresentation of its legal effect, and that the indorser's liability was to remain still in force.

ASSUMPSIT upon a promissory note made by one *W. W. Jones*, for 150*l.* at two months date from 15th *March*, 1821, payable to the defendant or order, and by the defendant indorsed to the plaintiff. Plea, the general issue. At the trial before *Garrow*, B. at the last *Lent* Assizes for the county of *Hereford*, the case was this:—The defendant indorsed the note in question for the accommodation of his brother, *W. W. Jones*, who was indebted to the plaintiff, and several other persons. After the note was due and dishonoured by the maker, the defendant was applied to for payment. The defendant said he would call and settle it, and requested that in the meantime the plaintiff would abstain from law proceedings until *W. W. Jones's* affairs could be investigated, at the same time urging that the plaintiff should get what he could from his (defendant's) brother towards payment of the note. In answer to this proposition the plaintiff sent a message to the defendant declining to have any thing to do with his brother, and stating that he should look to the defendant alone for the amount. The defendant then said that Mr. *Morgan*, an auctioneer, had investigated his brother's affairs, and was of opinion that his effects would produce five shillings in the pound for all the creditors. A meeting afterwards took place between the plaintiff and the defendant, when the latter said that as he, the plaintiff, had signed an agreement for a composition of 5*s.* in the pound on the amount of the note, he would not be entitled to the whole of the debt, but that he, the defendant, would give him his note of hand for the remaining 15*s.* in the pound. The plaintiff on that occasion said, he had signed the agreement for a composition, on the understanding that all the creditors of *W. W. Jones* would come forward and sign the agreement and accept the composition, but as they had not done so, he considered the agreement

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to be null and void. The witness to this conversation stated on cross-examination that the plaintiff told him he had signed the agreement for composition on the faith of the defendant's promise that he would pay the remaining 15*s.* in the pound. In answer to this case, it was contended that the debt due from the defendant to the plaintiff was extinguished by the agreement to accept a composition of 5*s.* in the pound from *W. W. Jones.* It was proved that at a meeting of *W. W. Jones's* creditors, held on 29th *May*, 1824, the plaintiff signed a paper to the following effect:—"We, the undersigned creditors of *William Walter Jones*, agree to accept of five shillings in the pound *in full* of our original demands against him, on having a joint note from him and his father *William Jones*, payable in twelve months from the date hereof." It appeared that on the footing of this agreement, *W. W. Jones* and his father gave their joint note of hand to the plaintiff for 5*s.* in the pound on the amount of the bill in question. It further appeared, that at the meeting of creditors convened for the purpose of signing the composition, *Morgan* the auctioneer, stated, as agent for *W. W. Jones*, that unless all the creditors signed the agreement, it was to go for nothing, and that the defendant would be still liable upon the original note for the residue of the plaintiff's debt although the plaintiff had signed the agreement for 5*s.* in the pound. The learned judge was inclined to think that the agreement for a composition of 5*s.* in the pound signed by the plaintiff was an extinguishment of the original debt, and consequently a discharge of the defendant, but he left it as a question of fact for the jury to say whether the plaintiff had not been induced to sign under a fraudulent misrepresentation, telling them that if any delusion had been practised upon the plaintiff, the agreement would not be binding. The jury found their verdict for the plaintiff, but credit was given to the defendant for the sum paid under the composition deed. In *Easter* term last, *W. E. Taunton* obtained a rule nisi for a new trial on the ground that the defendant was discharged by the plaintiff having signed the

agreement, and taken the joint note of *W. W. Jones* and his father in satisfaction of the composition.

Russell and *R. V. Richards* now shewed cause, and contended that as the plaintiff had been induced to sign the agreement for a composition under a representation, first, that the defendant would still continue liable on the note for the residue of the debt, and second, that the agreement was to go for nothing unless all the creditors signed, he was not estopped from maintaining the present action, and they relied upon *Cooling* v. *Noyes* (*a*), and *Thomas* v. *Courtenay* (*b*), and cited *Cockshott* v. *Bennett* (*c*), and *Stock* v. *Mawson* (*d*). The jury having found by their verdict that the plaintiff had been induced to sign in consequence of fraudulent misrepresentations, and that delusion had been practised upon him, the agreement for a composition was void as against him ab initio, and could not operate to discharge the defendant as a surety.

W. E. Taunton, (with whom was *Campbell*) contrà, was stopped by the Court.

BAYLEY, J.—I think that in this case there ought to be a new trial. There is no doubt, that if a creditor sign a composition deed or agreement, by means of which other creditors are induced to sign, and there is a surety who pledges his responsibility for the payment of the composition, and he, the creditor, in order to reserve to himself greater advantage and put himself in a better situation than the rest of the creditors, enters into a private bargain with a third person, such private bargain would be a fraud upon the surety and void. There are a great number of authorities to prove that proposition. Whether in the case of a person jointly liable in the character of surety, and the creditor is induced to sign the composition deed at the

(*a*) 6 T. R. 263.
(*b*) 1 B. and A. 1.
(*c*) 2 T. R. 763.
(*d*) 1 B. and P. 286.

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instance of the former, upon a distinct engagement by him that he will make up the difference without calling upon the principal debtor for reimbursement, and the creditor is thereby prevailed upon to forego all claim upon the principal, such an arrangement would have the effect of continuing the responsibility of the surety, it is not necessary in this case to decide, because it has not been left to the consideration of a jury whether there was such an arrangement on the part of the defendant; and the evidence does not warrant us in drawing the conclusion affirmatively that there was such a bargain. The principle point insisted upon at the trial, and left to the consideration of the jury, was, whether the plaintiff was induced to sign the agreement for a composition upon such a fraudulent misrepresentation as to render his signature absolutely void. A party is always supposed to know (and it is his bounden duty to know, and he is to be taken to know at his peril,) what the legal effect and operation of a particular instrument signed by him will be. If a party is told that an instrument which he sees before his eyes, and signs knowingly, by which he declares he will accept 5*s.* in the pound *in full* of his original demand against the principal debtor, will not operate as a complete discharge of the debt, I do not think such information can vary the legal effect of his signature. It is true it is misinformation, but that misinformation does not, as it seems to me, vacate the operation of his own act. Here there are two grounds of misrepresentation,—not proved, but assumed; first, that the plaintiff must have been told that notwithstanding the signature of this paper by him, the responsibility of this defendant would still continue; and it is argued that no man in his senses would have consented to sign the agreement for a composition unless there had been a misrepresentation to him in that respect. Now assuming that there had been such a misrepresentation proved in evidence, it would only have been a mistatement of the legal effect and operation of the paper; and I for one am of opinion that evidence to that effect could not be admitted in the case,

because if we were to allow evidence of that description in a court of law, no written document could ever be depended upon as expressing the meaning of the parties; and persons who had signed written papers would be continually endeavouring to impeach their written instruments by the production of evidence, in some cases true perhaps, but in a variety of instances probably false, that there had been misrepresentations made to them as to the legal effect of what they had signed. The second assumed ground of misrepresentation, is, that the plaintiff was told there would be no risk whatever in signing the agreement, for unless all the creditors signed, it would go for nothing, and would be void. Assuming that such a misrepresentation had been made, still in my opinion the argument arising from it ought to receive the same answer as upon the first. If a party at the time of signing says, he will sign on the condition that all the creditors shall come in on the same terms, and annexes such a condition to his signature, undoubtedly it would be void against him if the other creditors did not sign. But if he sign generally and without condition, it appears to me that he is not at liberty afterwards to evade the effect of his signature by complaining of a misrepresentation. In order to see whether it is void, we must look at the document itself, and if there is nothing on the face of it to restrain the general operation, we must give it its legal effect; for otherwise it would come within the scope of the first ground of pretended misrepresentation, and open the door to the admission of parol evidence to vary the effect of a written instrument. There is no pretence for saying that at the time when this agreement was executed, the plaintiff had stipulated for any condition as applicable to his signature, or that he signed it upon the terms and conditions that it was to be void unless all the other creditors came in and signed. It is said that the agreement was void ab initio on the ground of fraud and delusion. I think not, inasmuch as it imports on the face of it, that the plaintiff would accept the joint note of the father and the original debtor as

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a composition of 5*s*. in the pound *in full* of his demand; and inasmuch as there is no evidence in the case to shew that there was a bargain on the part of the defendant that he would continue liable, for he would not otherwise be compellable by law to pay for the original debtor, I think the rule must be made absolute for a new trial.

HOLROYD, J. was of opinion, that the acceptance of the joint note of the father and the principal debtor, under the composition, which declared that the plaintiff had consented to take 5*s*. in the pound *in full* of the original demand, was a complete discharge of the defendant's liability, and amounted to an accord and satisfaction of the original debt.

LITTLEDALE, J. concurred.

Rule absolute.

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The actual possession of crown land, under a parol license from the crown, entitles the party so in possession to maintain trespass against a wrong-doer.

Payment of a nominal rent to the crown, the occasional occupation of the land by sporting over it, and taking the grass by a servant, constitute sufficient evidence of such actual possession. A party in possession under such circumstances has no legal title as against the crown, but, *semble*, that he is not an intruder upon the crown.

Where a public footway over crown land is extinguished by an inclosure act, but the public continue for twenty years afterwards to use the way; such user is not evidence of a dedication of the way to the public, unless it appears to have had the consent of the crown.

TRESPASS. The first count stated that defendant, on the 1st *January*, 1820, and on divers other days and times, &c. broke and entered a certain close of plaintiff called the *Banks*, and a certain other close of plaintiff, called the *Allotment*, No. 15, respectively situate in the parish of *Hanbury*, in the county of *Stafford*, and a certain other close of plaintiff, situate in the parish and county aforesaid, bounded on the *east* by a certain road, called the *Marchington Cliff* road, and a certain allotment marked No. 14, in a certain award of certain commissioners appointed by a certain act of parliament, passed A. D. 1801, for inclosing

the forest or chase of *Needwood*, towards the *west* and *north-west*, by plots 4 and 16, and allotment 17, and road *A*., mentioned in the said award, towards the *north*, by allotments 17 and 18, and late incroachments, 19, 21, and 22, mentioned in the said award, and towards the *south-east* and *south* by allotments 13 and 14, mentioned in the said award, and towards the *south-west* by a certain other road, called *Woodroffe's Cliff* road, and plots 14 and 16, mentioned in the said award, trod down the grass, and broke the fences. Second count, that defendant broke and entered five other closes of plaintiff, situate in the lately disafforested forest of *Needwood*, trod down the grass, and broke the fences. Pleas, first, not guilty. Second, a public highway into, through, over, and along, the closes in which, &c. Third, that the closes, in the last count mentioned, were the soil and freehold of defendant. Fourth, that the closes in which &c. were the soil and freehold of the King, and that defendant, by the leave and license of the King, committed the said supposed trespasses, in the first count mentioned. Replications, taking issue upon all the pleas, with a new assignment that defendant committed the trespasses in the declaration mentioned on other and different occasions, and for other and different purposes than in the second and last pleas mentioned, and after the determination of the leave and license in the last plea mentioned, and in other and different parts of the said closes, out of the said way, in the second plea mentioned, &c. Rejoinder, to the second, third, and last pleas, a similiter: as to the new assignment, defendant suffered judgment to go by default. At the trial before *Garrow*, B. at the last *Lent* assizes for *Staffordshire*, the case on the part of the plaintiff was this:—The locus in quo was part of an allotment made to the King by the award of the commissioners, under an act of parliament, passed in the year 1801, for dividing, allotting and inclosing the forest or chase of *Needwood*, in *Staffordshire*. In the act it was recited, that the King was seized to himself, his heirs and successors, of the forest or chase of *Needwood*,

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containing about 9,400 acres, lying within the honour or lordship of *Tutbury*, parcel of the estates and possessions of the duchy of *Lancaster*; subject to common of pasturage, &c. The commissioners were then authorized to set out such public bridle-roads and footways, and private roads and ways, in, over, and upon the said forest or chase, as they should deem requisite. It was then enacted that when such several public and private roads and ways should have been set out and made, it should not be lawful for any person, either on foot, or with horses, cattle, or carriages, to use any other roads or ways, public or private, over or upon the ancient or new inclosures, or the forest or chase, than such as should have been made and set out by the commissioners; which said several roads and ways, so to be set out respectively, should be set forth in the award of the commissioners, and the same should be final and conclusive upon all persons whomsoever; and that all former roads and ways, which should not be set out and appointed as roads and ways, through and over the said forest or chase, should be deemed part thereof, and be divided and allotted accordingly. And it then empowered the King, his heirs and successors, to make and grant leases, under the seal of the duchy of *Lancaster*, for any term not exceeding ninety-nine years, and so as such leases be in all other respects made and granted agreeable and conformable to the terms and conditions prescribed and directed by the statute 1 *Ann.* st. 1. c. 7. s. 5. (*a*). Ever since the year 1817 the plaintiff held, and

(*a*) By which, after reciting that the expenses of supporting the crown, or the greatest part of them, were formerly defrayed by a land revenue, which had been impaired and diminished by the grants of former kings and queens, so that they could afford very little towards the support of the government; and that the land revenues in rents and other profits might thereafter be increased, and consequently the burthens of the subjects of this realm might be eased and lessened in future provisions to be made for the expenses of the civil government: It is enacted, inter alia, that all leases granted by her Majesty, her heirs or successors, of any lands or hereditaments then or thereafter belonging to her Majesty, her heirs or successors, in right of her duchy of *Lancaster*, whereby any estate or interest may pass from her Majesty,

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paid to the King for, his woodland allotments of *Needwood*, a nominal rent of twenty shillings a year. That rent was not equal to one third of the yearly value. The timber upon the land was reserved to the King. The woodlands comprised about 1000 acres, and included the locus in quo. The persons who had the charge and management of the timber, namely, the gamekeeper, the deputy axe-bearer, and the woodward, were all paid by the King, and the fences were kept in repair at the King's expense. The plaintiff resided in *London*, but regularly visited *Needwood* in the month of *August*, and remained there till the month of *November*, during which interval he constantly went over the whole of the allotment, including the locus in quo, for the purpose of finding and killing game. There was grass in the glades throughout the allotment, which was regularly cut and gathered by *Wallis*, the woodward, by the permission of the plaintiff. The commissioners made their award in the year 1805, but they set out no footpath across the locus in quo. Previous to the inclosure there were footpaths across the allotment in all directions, and one over the locus in quo. In the year 1806 the allotment was fenced all round, and no road or path was then left over the locus in quo. About fifteen years ago, a board was erected at the end of the old path, stating that there was no thoroughfare. That was shortly afterwards pulled down, it did not appear by whom, and then another was erected, giving notice that persons trespassing would be prosecuted according to law. On the part of the defendant the trespass was not disputed. Evidence was tendered to shew that the surveyor, who made the allotments under the Inclosure Act, actually set out a footpath over the locus in quo, but the learned judge, being of opinion that the award was conclusive, refused to receive the evidence. It was then

her heirs or successors, shall be void and of no effect unless (in case of lands not before let) there shall be reserved a reasonable rent, not under the third part of the clear yearly value of the lands and hereditaments contained in such lease.

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proved that from the time of making the award down to the time of the trial, the footpath over the locus in quo had been generally used by the public. Two points were then made for the defendant; first, that the plaintiff had not shewn that he had any legal possession of the locus in quo, because he had not produced any lease under the seal of the duchy of *Lancaster;* and even if there could be a parol demise of the land from the King, still the statute 1 *Ann.* st. 1. c. 7. s. 5. had not been satisfied, inasmuch as the rent was less than one third of the value; and upon this point a nonsuit was claimed. Secondly, it was contended that the evidence given of the uses of the way amounted to presumptive proof of a dedication of it to the public, in which case the defendant was entitled to a verdict. The learned judge overruled the first objection, being of opinion that the plaintiff had sufficient possession to maintain trespass against a wrong doer; but he reserved the point, and gave the defendant leave to move to enter a nonsuit. Upon the second point his lordship directed the jury to find for the defendant, if they believed that the user of the way had been with the consent of the King as owner of the soil; but if not, to find for the plaintiff. The jury found for the plaintiff.

Taunton, in *Easter* term last, obtained a rule nisi, in the alternative, either for a nonsuit on the first point, or for a new trial on the second.

Jervis, Walton, and *Campbell,* now shewed cause. The plaintiff occupied the land under a parol license from the crown, and he paid rent for it since the year 1817. In point of law that license operated as a parol demise, creating either a tenancy from year to year, or a tenancy at will, and giving the plaintiff, therefore, such an interest as entitled him to maintain trespass against a wrong-doer. As between subject and subject, it is not disputed that such would be the effect; but it is said that in the case of crown land, a parol demise confers no title even against a wrong-doer,

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and that the plaintiff is a mere intruder, and as such cannot maintain trespass. But he cannot be deemed an intruder, for though he had no title as against the crown, he had a title, by the license of the crown, as against the defendant, for mere possession is a sufficient title against a wrong-doer. A note by *Anderson*, C. J. in 4th *Leonard*, 184, and in *Godbolt*, 183, will be relied on by the other side as shewing that an intruder upon the crown cannot maintain trespass; but the doctrine there laid down is expressly denied in a subsequent case of *Johnson* v. *Barrett* (a), the authority of which, and the position there advanced, namely, that an intruder on the crown *may* maintain trespass, is recognized and supported by Lord Chief Baron *Comyn*, in his Digest. That was "an action of trespass for carrying away soil and timber, and the question arose upon a quay that was erected at *Yarmouth*, and destroyed by the bailiffs and burgesses of the town; and *Roll* said that if it were erected between the high water mark and low water mark, then it belonged to him that had the land adjoining. But *Hale* did earnestly affirm the contrary, viz. that it belonged to the King, of common right. But it was clearly agreed, that if it were erected beneath the low water mark, then it belonged to the King. It was likewise agreed, that an intruder upon the King's possession might have an action of trespass against a stranger; but he could not make a lease, whereupon the lessee might maintain an ejectione firmæ." In support of the dictum of *Anderson*, C. J. in the case in 4th *Leonard* and *Godbolt*, *Rhodes*, J. there cites 19 *Ed.* 4. 2. Pl. 5, which, as reported in *Plowden*, is this (b):—Trespass for entering a close, and taking the grass. The defendant pleaded that by an office found the tenements had escheated to the crown *before the day of the trespass committed*. It was held, "that as to such things as arise from the land, as the grass and the like, the action, which was well given to the plaintiff, was taken away by the office found afterwards, which, by its relation, entitled the King thereto; but as to

(a) Alcyn, 10, 11. (b) Plowd. 489.

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the entry into the land, or breaking of fences, which do not arise from the land, nor are any part of the annual increase of it, the action is not taken away by the office." That case shews that a person having the *possession* of crown land, may maintain trespass for an injury done thereto, after his *right* to the land has ceased by escheat; but that he cannot recover the profits of the land, because those have vested in the crown: and, consequently, is an authority against, instead of for, the purpose for which it was cited by *Rhodes*, J. It is clear, therefore, from the old authorities, that mere possession, whether the party be an intruder or not, is sufficient to give a right of action against a wrong-doer, and there are modern authorities to the same point. In *Graham* v. *Peat* (*a*) it was held that a party, having the *possession* of glebe land under a lease which was void in law, might maintain trespass against a wrong-doer, although he himself had no title as against the lessor (*b*); and in *Dyson* v. *Collick* (*c*), *Holroyd*, J. is reported to have said " Even in the case where a party has the possession only, without the legal property, it is held, that trespass will lie. In *Welch* v. *Nash* (*d*) this general proposition was established, that a person who is in possession, *rightfully or wrongfully*, has a right to maintain an action of trespass against a mere wrong-doer, and that the Court cannot enter into the question whether the possession is rightful or wrongful." Then, upon the second point, the user of the way, subsequently to the award, was no evidence of a dedication of that way to the public. There was no dedicator. The crown could not dedicate, because the possession was in the plaintiff; and the plaintiff could not dedicate, because he had no authority to bind the crown: consequently, without the consent and co-operation of both, of which there was no evidence, there could not possibly be a dedication. For that *Wood* v. *Veal* (*e*) is a decisive authority. Neither of these objections, therefore, is well-founded, and this rule must be discharged.

(*a*) 1 East, 244. (*b*) 2 East, 467. (*c*) Ante, vol. i. 226.
(*d*) 8 East, 394. (*e*) Ante, vol. i. 20.

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W. E. Taunton, Brougham, and *W. O. Russell,* contrà. Assuming that mere possession would support this action, still the plaintiff has no right to sue, for there was no evidence of his having the actual possession of the land. It was proved that he sported over the land for a few months in the year, but by what license or authority did not appear; and *Wallis's* evidence went to shew a possession in *him,* instead of the plaintiff, for *he* took the grass, which was part of the profits of the land, and must have belonged to the crown. But *actual* possession is not enough; there must be a *legal* possession to support distress. *Dyson* v. *Collick* (a) is very different from this case. There the dam was erected with the consent of the owners of the land, and the property in the dam was in the plaintiffs; therefore they had the legal possession at the time when the trespass was committed. So, in *Graham* v. *Peat* (b), the lease was originally good, and became void by matter arising ex post facto, namely, the non-residence of the lessor; but here the supposed demise by the crown never did or could exist in point of law. It is contended that the crown may demise by parol; but it is an established principle of law, on the contrary, that nothing can pass from the crown except by matter of record. That is laid down in *Viner's* Abridgement (c), where *Brook's* Abridgement (d) and the following cases are cited in support of the position. "The King may give several things without writing, and yet if it comes in ure in the law, it is good for nothing. Per *Brian* clearly, Br. Prerog. Pl. 61. citing 4 *H.* 7. But *Shelly,* J. was precise in the time of *H.* 8, that it is a good gift of chattels moveable without writing, as of a horse, &c. *ibid,* S. P. Br. Prerog. pl. 70, citing 35 *H.* 8." It is clear then, that, generally speaking, the crown cannot convey any interest in land, except by record under the great seal; and the rule holds with respect to land situate within the duchy of *Lancaster,* for that cannot pass except by record under the duchy

(a) Ante, vol. i. 225.
(b) 1 East, 244.
(c) Prerogative, M. b. 7.
(d) Prerogative, Pl. 70.

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seal. For that there are many authorities: Vin. Abr. Prerogative, E. b. 2; Bac. Abr. Prerogative, E. 3; 2 Dyer, 232, a; 2 Luttwich, 1233; and 4 Inst. 210. It is said in Co. Lit. 57, b., "Against the King there is no tenant at sufferance, but he that holdeth over is an intruder upon the King, because there is no laches imputed to the King for not entering:" and in *Finch's* case (*a*), *Manwood,* C. B. speaking of the defendant, who was lessee of the crown, said, "Tenant at sufferance he cannot be; every tenancy at sufferance is made by the laches of the lessor, which laches cannot be imputed to the Queen." Again, in Co. Litt. 41. b., it is said, "Against the King there shall be no occupant, because nullum tempus occurrit regi; and, therefore, no man shall gain the King's land by priority of entry." Then, without a lease from the crown, it is clear that the plaintiff has no occupancy or possession sufficient to maintain trespass; and assuming that he has a lease, that lease is void for non-compliance with the provisions of the *Needwood* Forest Act, and of the 1 *Ann.* st. 1. c. 7. s. 5. The former empowers the King to grant leases, upon this condition, among others, that they be agreeable and conformable to the terms of the latter; and the latter provides that all such leases shall be void and of no effect, unless there shall be reserved a reasonable rent, not under the third part of the clear yearly value of the land; and such rent is made payable to the King. Here, the rent reserved was merely nominal, and was not shewn to have been paid, or payable, to the crown itself; therefore, the lease, assuming it to have existed, was void in law, and gave the plaintiff no title. If so, he was a mere intruder upon the King's possession, and such an intruder, it was decided in the case in 4th *Leonard* and *Godbolt,* cannot maintain trespass. The case in *Aleyn* certainly seems an authority per contrà; but it is to be observed, that it is not made distinctly to appear there, that the right to the soil was in the crown, for it is not stated that the quay was erected between high and low

(*a*) 2 Leon. 134. 143.

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water mark; and the dictum altogether is extra-judicial. The case in the Year Book, 19 *Ed.* 4, is not at all at variance with the case in 4th *Leonard* and *Godbolt*, because there the action was founded upon a trespass committed before office found, but after the land had re-vested in the crown; and though the crown had the *interest*, it could not have the *possession*, until after office found. In Bacon's Abridgement (*a*) it is said, that where a subject shall not have possession in deed or in law without entry, the King will not be entitled without office found or other matter of record; as, if the King's tenant aliene in mortmain, or without license, or, if the King claims upon a forfeiture or a condition broken, his title must be found by office; or, if he claims the lands of an idiot or lunatic, the person must be proved an ideot or lunatic by office. Then, if the reversioner in the case in 19 *Ed.* 4. had been a subject, he could have obtained possession only by an actual entry, and then the King could not have obtained possession by virtue of the escheat, until after office found. So, in *Finch's* case, it was said, with respect to this very point, "Upon the breach of this condition for the rent, although that the lease be become void, yet the possession of the land is not re-settled in the Queen without office; and although the office doth not make the lease void, which was void before for non-payment of rent, yet before office found, the possession is not vested in the Queen; for before office found we cannot award process against such a lessee for his continuing the possession after the rent behind, *and until office found the lessee cannot be found an intruder.*" (*b*). That, therefore, explains and reconciles the case in *Aleyn*, and shews that even where the King is entitled to land, the possession does not vest in him until office found; but, on the contrary, that until office found, the right of possession remains in him who held under the King's tenant, and that *he* may maintain trespass for an injury done to his possession. It is said in Co. Litt. 62. b., "If a man let lands to another, to hold to

(*a*) Prerogative, E. 7.

(*b*) 2 Leon. 143.

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him and his heirs, at the will of the lessor, these words, *and his heirs*, are void; for in this case if the lessee dieth, and his heir enter, the lessor shall have a good action of trespass against him, before any entry made by the lessor;" and the same principle was acted upon as good law by *Bridgman*, C. J. in the case of *Gray* v. *Bearcroft* (a). Then, if the plaintiff can be considered as a lessee at will, the right to sue was not in him, but in the crown. [*Holroyd*, J. It may be in both.] Then, secondly, even if there was a possession sufficient to maintain trespass, still there was evidence for the jury to presume a dedication of the way to the public, for it was proved that the public had continued to use the way ever since the award was made. Now, the attention of the jury was not sufficiently directed to the weight and bearing of that evidence, and upon that ground, if not upon the other, the defendant is clearly entitled to a new trial.

BAYLEY, J.—The first question in this case is, whether the plaintiff had any *actual* possession of the land in respect of which the action is brought. It was insisted at the trial that he had not, and could not by law have, any right of possession, because the requisites of the statute 1 *Ann*. st. 1. c. 7. s. 5. and of the *Needwood* Forest Act, had not been complied with; but the question whether he had or had not any *actual* possession, as it has been pressed upon our consideration now by Mr. *Russell*, does not appear to have been matter of dispute at the trial, and certainly was no part of the foundation upon which the rule was granted. On that point, what evidence there was went strongly to shew that there was an *actual* possession in the plaintiff, for, according to the account given by Mr. *Hinckley*, one of the witnesses, the only property belonging to the crown consisted of the trees; beyond them, no act of possession or enjoyment was exercised by the crown or by any person claiming under it. But it was proved that the plaintiff paid a rent

(a) Carter, 66.

of twenty shillings a year for this land. That was a nominal rent indeed, but still it was *rent*, and it must have been paid for something, and could hardly have been accepted except upon the principle that if there was not a proper conveyance from the crown to the plaintiff, there ought to have been such a conveyance, and that the plaintiff was nevertheless entitled to enjoy some benefit in return for the rent which he paid. Now, what benefit was the land capable of yielding? It was in evidence that the plaintiff, by himself, and by others acting under him, exercised the full enjoyment derivable from the land; that it was wood-land, having rides upon it, and a considerable quantity of game; and affording, therefore, to any person going to the place an opportunity of killing game. It was, indeed, also in evidence that the crown had been accustomed to repair the fences, but that is often done by an ordinary landlord in respect of land in the possession of his tenant. The plaintiff himself does not appear to have had any other enjoyment of the land, than that of killing the game: that he seems to have taken to himself. He went about *August*, and remained till about *November*, during which time he regularly exercised the privilege of sporting. But with respect to the herbage of the land: who had that? A person of the name of *Wallis* had it. Upon what principle did he take it? Did he take it under the crown, or did he not take it under the plaintiff, by virtue of the right which he claims in respect of his payment of twenty shillings a year? He clearly took it from time to time by license from the plaintiff; not such a license as vested the right of possession in him (Mr. *Wallis*), but only as a privilege which the plaintiff conferred upon him: in a word, he took it as the representative of the plaintiff. If I had been to put the question to the jury, whether, upon this evidence, there was not an *actual* possession in the plaintiff, I could not have advised them that there was a sufficient foundation for answering that question in the negative. But it is contended by the statute of *Ann*, and upon the authority of a case very loosely reported in 4th

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Leonard and in *Godbolt* (*a*), that although the plaintiff may have the *actual* possession, yet he has not such a possession as, in the case of crown land, will authorize him to maintain an action of trespass, even against a wrong-doer. I readily accede to this, that the plaintiff has not any such right of possession as is requisite to convey a title, and, therefore, that there being no such grant to him as the statute of *Ann* and the *Needwood* Forest Act require, he has no legal title against the crown, and the crown would be able at any moment to remove him from that possession and occupation which he has, from the time of first paying rent down to the present period, enjoyed. But still it becomes a question whether a person having the actual possession of crown land cannot maintain an action of trespass against any one who commits trespass upon it, such person not acting under the authority of the crown, but being a mere wrong-doer. In the case of land of an ordinary description, actual possession is sufficient to entitle the party possessed to maintain trespass against a wrong-doer. This has been established by a great variety of cases, as *Graham* v. *Peat* (*b*), and many others. There is one case in particular which is extremely strong upon the point, namely, *Chambers* v. *Donaldson* (*c*). That was an action of trespass, to which the defendant pleaded liberum tenementum in a third person, under whose authority he did the act complained of. The plaintiff, in his replication, admitted the liberum tenementum, but traversed the authority. The defendant demurred to the replication, and, after a very full argument, it was held by the whole Court, that though it must be presumed upon these pleadings that the plaintiff's possession was wrongful as against the person in whom the freehold was, still that such a possession was rightful, and would support an action of trespass against a wrong-doer; and that unless the defendant acted under the authority of the person in whom the freehold was alleged to be, he could not justify a trespass committed upon any individual having the actual possession

(*a*) 4 Leo. 184. Godbolt, 133. (*b*) 1 East, 244. (*c*) 11 East, 65.

of the land. Here, a distinction has been taken, with reference to the plea as framed in this case and in *Chambers* v. *Donaldson* (*a*), between land belonging to the crown, and land belonging to a private individual, and if that distinction is valid in point of law, the defendant is entitled to the benefit of it. The distinction is founded upon the authority of the case already alluded to as reported in 4th *Leonard* (*b*), and in *Godbolt* (*c*), and in which *Anderson*, C. J. puts this case : "If one intrude upon the possession of the King, and another man entereth upon him, he shall not have any action of trespass for that entry; for that he who is to have and maintain trespass, ought to have a *possession*. But in such case he hath *not a possession*, for every intruder shall answer to the King for his whole time, and every intrusion supposeth the possession to be in the King." Now the words, "and another man entereth upon him," upon which I think much stress is to be laid, I understand to mean that another intrudes and actually ousts the person who was originally in possession, and, therefore, that the sole right reverts to and remains in the crown. Then, the case would stand thus: *A.*, being an intruder, enters. *B.* afterwards intrudes, and excludes *A.*, and for that entry, and keeping him out of possession, *A.* brings trespass against *B.* It is right that *A.* should not be at liberty to maintain that action, for the possession was not legally or properly either in *A.* or *B.* during any part of the time. The right of possession was in the crown, and the crown had a right to call on both to account for the profits each had received during the time he remained in possession. I think that is substantially all that can be collected from that particular case. The Report adds, that "*Periam*, J. doubted of it, and *Rhodes*, J. said and vouched 19 *Edw.* 4. 2 pl. 5. to be, that he cannot in such case say, in an action of trespass, quare clausum *suum fregit*." Now, if we look to the case in 19 *Edw.* 4. which I take to be the foundation of the case in *Leonard* and *Godbolt*, it explains the language adopted in

(*a*) 11 East, 65. (*b*) 4 Leo. 184. (*c*) Godbolt, 133.

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that case, namely, "that every intruder shall answer to the King for his whole time." It was trespass for breaking and entering the plaintiff's close, and taking the grass, and cutting the trees. Therefore it was an action *in respect of profits*. The defendant pleaded that before the day of the trespass, a commission issued from the Exchequer, directed to the escheator of the county of *Suffolk*, to enquire of all manner of lands and tenements, &c.; and before the same escheator it was found, in the same county, that one *John B.* held the same land of the King, &c. and died without an heir, wherefore the King *entered*, &c. judgment, &c. *Vavisor*. "This is no plea, for notwithstanding that the King has cause to have all manner of issues and profits issuing out of, &c. yet this shall not excuse him who did the trespass; as in like case, if a stranger take certain goods (which I have), out of my possession, and he whose property they are release to the stranger, still I shall have an action of trespass against him for the taking, &c. and yet he shall have the goods." *Townsend*. "The contrary appears to me, for I apprehend when the King is entitled to have any land, he shall be answered for the issues and profits from the first day of his title to the day of office found, and that every man shall answer for his time, namely, each of those who occupied for the time of his occupation. Then, if he who shall have the administration and occupation of such lands shall have no action, in this case it shall be that he account for the issues (arising during his occupation), and yet the defendant have them, which would be unreasonable." *Choke*. "For such things as arise from the land, the action by this office found is clearly gone; but for such things as do not arise from the land, as for entering the land and breaking the hedges, or for the taking of any chattel, in this case the action is not gone by the office and seizure for the King; but where the action is brought for things which arise from the land, as for cutting grass and the like, there, when the office is found for the King, all actions are gone for ever, for he shall not answer for those matters; but this

person shall answer for the time, wherefore, &c." Now the decision there amounts to this: in an action brought *for the profits of the land*, the party is amenable to the crown only, and for such profits as accrued only while he was in possession: but in an action of trespass, for a mere injury to the actual possession, not interfering with the profits of the land, the party is amenable to the actual occupier, although the latter may himself have no title as against the crown. If, therefore, the case in 19 *Edw.* 4. is the foundation of the case in 4 *Leonard* and in *Godbolt*, the latter differs most materially from the present, because there before the action was brought there was an office found and the crown *had entered*; the plaintiff, therefore, was as much in the wrongful possession as the defendant, and the crown had a right of action against them both, but neither of them had a right of action against the other. But both those cases are cases of actions brought by intruders, and then the question arises whether the character of intruder can properly be said to apply to the plaintiff in the present case. In *Johnston* v. *Barrett*, in *Aleyn* (a), who was considerably subsequent to *Leonard*, there is a dictum which militates strongly against the cases in *Leonard* and *Godbolt*. That was an action of trespass for carrying away soil and timber, and destroying a quay. There was a variance in the opinions of the judges upon the question to whom the freehold in the soil between high and low water mark belonged, whether to the crown, or to some third person; but "it was clearly agreed that an intruder upon the King's possession might have an action of trespass against a stranger; but he could not make a lease, whereupon the lessee might obtain an ejectione firmæ." Now what is the meaning of that? I think clearly this: that even an intruder may have such a possession as will enable him to maintain an action of trespass against a stranger who commits an injury to his possession, although he has no title himself, and consequently no power to gran a lease or to support an action of ejectment. If that be so,

(a) Aleyn, 10, 11.

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let us apply that rule of law to the present case, and see in what manner it operates. Admitting that Mr. *Harper* has no title, (for there certainly is no such conveyance to him as the statute of *Ann.* and the *Needwood* Forest Act required,) and has consequently no power to grant a lease, or to bring an action of ejectment; still, according to the authority in *Aleyn*, he is entitled to maintain an action of trespass against a stranger who does an injury to the property, because at the time of the injury done, the actual possession is in him. These are undoubtedly conflicting authorities, but that in *Aleyn* is considerably later than the other, and seems to me to partake more of good sense and sound policy, and to be better calculated to prevent acts of trespass. I think it desirable that the party whom the crown permits to have the actual possession of lands situated like the lands in question, should have the power of calling to an account any individual who trespasses upon them; for otherwise, the property would be exposed to every species of inroad or trespass, all of which would pass unpunished, except the crown thought proper to interfere by resorting to the exercise of its prerogative process, which it could hardly be expected to do, especially in trifling cases. But, is Mr. *Harper* an intruder upon the crown? I think not. I consider an intruder to be, not merely a person who is in without title, but a person who comes in, if not against the will, at least without the knowledge or sanction of the crown; whereas Mr. *Harper* evidently came into and continued in possession with the full consent and concurrence of the crown. It seems to me that if an information was filed against Mr. *Harper* for intrusion, on the ground that he was in the wrongful possession of crown land, it would be an answer in point of law to say that he was in possession by the leave and license of the crown, in order to his exercising the actual occupation of the land. I take it there is a very material distinction between what is essential to be done to convey a title from the crown, and what is essential to be done to take away the right of the crown to treat a party as

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a wrong-doer. Whenever you insist upon a title from the crown, you must shew that title as matter of record; but there are many privileges which the crown may confer so as to take away from itself the power to treat the party as a wrong-doer, which may be granted by parol, and need not be transferred by grant under the great seal. The case of a corporation is to a certain degree analagous. A corporation can only *grant* by deed, yet there are many things which a corporation has power to do by parol, as the appointment of officers, &c.; and I think the crown has a similar power. I am, therefore, of opinion, that Mr. *Harper* was in the actual possession of these lands, and that actual possession, notwithstanding the authorities relied on to the contrary, even of crown land, is sufficient to entitle the party so possessed to maintain trespass against any person who is a mere wrong-doer. Then the remaining question is, whether there was, or was not at the trial, sufficient evidence of the locus in quo being a public way at the time when the alleged trespass was committed. Now, it appeared, that in the year 1801 an inclosure act was passed comprehending the lands in question, by which every description of road which had previously existed over the lands was to be discontinued, unless there was an express provision in the award for their continuance: and there certainly was no such provision for continuing the road claimed by the defendant. In 1805 the inclosure was made. Since that time, it has been said, the road has been used, and used in such a manner as to warrant a court of law in saying that it is still a public road. But was this user acquiesced in? Clearly not. So long as fourteen or fifteen years ago a board was erected warning the public that the road in question was not a public road, and that there was no right of way along it. It is true that board was afterwards removed, it did not appear by whom; but its erection clearly indicated the intention of the persons having either the right to the soil or the actual occupation of the land, to discontinue the way. Afterwards another board was

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erected, warning the public not to trespass, and giving notice that all persons thereafter found trespassing would be prosecuted. It may be true, as was contended in argument, that that notice applied to persons trespassing extra viam; but it might also apply to the way itself, and at least it was an intimation that there was no public thoroughfare along the land. But it was said, there was a dedication of the land to the public. But who has so dedicated it? The soil was in the crown. Has the crown dedicated it to the publc? Clearly not: and no other person had power or authority to do so. It was decided in the recent case of *Wood* v. *Veal* (a) that even where a way had been used by the public for a great number of years, the lessee, under a valid lease, of the estate through which the way passed, could not constitute it a public highway, without the privity of the landlord, and a dedication of it to the public by him. That shews that a tenant for years, or termor, cannot dedicate a road to the public without the consent of his lessor, and shews further, that there could not be any legal dedication of the way in this case to the public, because as the crown, to whom the soil belonged, had not done it, or authorized it to be done, (at least there was no evidence that it had,) it is quite clear that a mere occupier could not do it either. I am, therefore, of opinion that neither of the objections raised in this case is available, and that the rule for granting a new trial ought to be discharged.

HOLROYD, J.—I am also of opinion that this rule ought to be discharged. After the very clear statement of the law on this subject which has been delivered, and the very able comments on the different cases which have been made by my brother *Bayley*, it will not be necessary for me to express my opinion upon this case otherwise than very briefly. I entirely concur in the exposition of the law which has been given. I agree in thinking that Mr. *Harper* took no legal estate in the land, and no interest in it under the act of par-

(a) Ante, Vol. I. 20.

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liament, because the requisites of the act were not complied with. I agree that he was not in a situation either to grant a lease, or to maintain an action of ejectment in respect of the land; but his right to maintain an action of trespass stands on a very different footing. In respect of private property it is settled and established law, that actual possession is quite sufficient to support an action of trespass against a wrong-doer for any injury done to the possession; and though there is some contradiction in the case in *Aleyn* as compared with that in 4th *Leonard*, yet, aided by the explanation which has been given of the foundation of the latter which appears in the Year Book of 19th *Edw.* 4, I think the same principle is to be extended to a person whom the law may for some purposes consider as an intruder. If the crown had treated Mr. *Harper* as an intruder, and had proceeded against him as being in the wrongful enjoyment and occupation of the land, this case would have assumed a very different aspect. But not only has nothing of that kind been done by or on behalf of the crown, but, so far as appears, the possession or occupation of Mr. *Harper*, whichever it is called, has been by the permission of the crown, though it be not such a permission as could vest the legal estate and interest in the land in him. I am of opinion that the actual occupation of the land, and enjoyment of the profits of it, under such circumstances, entitles the occupier to maintain trespass against a wrong-doer, although he may have no right or title in himself as against the crown, under whom he occupies. The dictum in *Aleyn* appears to me to be agreeable with, and to be founded upon the same principle as the decision in *Chambers* v. *Donaldson* (*a*), and I think we shall only be supporting that principle by holding that in the case of crown land, as well as other land, actual possession is sufficient to give an action of trespass against a wrong-doer. With respect to the other point, I think there is not the slightest pretence for saying that there was

(*a*) 11 East, 65.

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any dedication of this way to the public. The rule, therefore, as respects both points, must be discharged.

LITTLEDALE, J.—I am also of the same opinion. As regards land belonging to a private individual it is quite clear that trespass may be maintained by the person having the actual possession against a wrong-doer, although the former would have no right as against the owner. Where a tenant holds over, or works a forfeiture by committing waste, or otherwise, his right against the landlord is gone, and the landlord may re-enter upon him; but still, while he retains the actual possession the tenant has a right of action against any person trespassing, who is without title altogether, or who claims under no better title than himself. *Graham* v. *Peat* (*a*) is one very strong example of this rule of law, for there it was held that a person in possession of glebe-land under a lease which was void by the statute of 13 *Eliz.* c. 20. by reason of the rector's non-residence, might still maintain trespass against a wrong-doer; although, as was afterwards held in *Frogmorton* v. *Scott* (*b*), the lessee was himself liable to be turned out of possession in an action of ejectment brought against him by the rector. The only case which has been cited as an authority in support of the doctrine that a person having the mere actual possession under the crown cannot maintain trespass, is that in 4th *Leonard*. We are not acquainted with all the facts and circumstances under which that case was decided. Probably it was the case of an actual entry and ouster, which would at once distinguish it from the present; and if not, still its authority has been considerably weakened, both by the subsequent contrary decision in *Aleyn*, and by the fact that one of the judges dissented from the opinion of the Court upon the point. Besides, the party there was an intruder, and it seems to me quite impossible to consider the present plaintiff in that character. He has no title as against the crown,

(*a*) 1 East, 244. (*b*) 2 East, 467.

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but he is in possession with the knowledge and under the license of the crown. He does not claim an interest for life, or even for years, under the crown; all that he insists upon is, that he is the person having the actual possession, and that the crown permits, because it does nothing to interfere with, that possession. That is his real character and situation, and that is sufficient to entitle him to maintain trespass against a wrong-doer. The crown may have the power at any moment to turn him out of possession, but while he remains in possession, he has clearly a right of action against a wrong-doer. As to the other question I am also of opinion that there is no ground for presuming any dedication of the way to the public; indeed the evidence, such as there was, leaned strongly the other way.

Rule discharged.

The KING v. THOMAS HILL.

Where, by custom or charter, a particular day is fixed for the election of the burgesses of a corporation, it is the duty of the burgesses to take notice that the election will take place on such particular day, and attend to exercise their elective franchises if they be so minded; but where no specific day is fixed by custom or charter, and the business of electing burgesses as well as other business may be done on many days in the year, notice must be given to the resident burgesses, of a corporate meeting for such purpose, and in such reasonable time as to give them all an opportunity of attending and voting at the election. Notice therefore by ringing a bell, fixed at the top of the Guildhall of a corporation, the liberties of which extend three miles, and in which there is an indefinite number of burgesses, is not a sufficient notice of a corporate meeting for the election of burgesses, nor can either a custom or a bye-law render such a notice binding, unless it appears that all the burgesses have attended *for the purpose* of electing burgesses.

QUO warranto information against the defendant for usurping the office of burgess of the town and borough of *Monmouth* without legal warrant. The defendant pleaded, first, that *Monmouth* is an ancient town and borough, and the burgesses are a body corporate, and that there is an indefinite number of burgesses; that from time whereof the memory of man is not to the contrary, a court hath been holden for the election of burgesses, and *that notice of holding such court hath been and ought to be given by the ringing*

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of a certain bell within the said town and borough; and that the burgesses, or so many as had a mind to be present, have attended at the said court, and they, or the major part of them, have elected and chosen such person or persons to be burgesses as they have thought fit, to the office or offices of burgess or burgesses, who have been sworn in; that on the 4th of *July*, 1820, *notice was given, according to the custom, by ringing the said bell, for holding the Court*, and that at the Court holden before *Charles Heath*, mayor, and *Herbert Harris* and *Hezekiah Swift*, bailiffs, the mayor and bailiffs and such of the burgesses as had a mind to be present, assembled together according to the usage and custom, and that the major part of them elected and chose the defendant to be a burgess, the defendant being such a person as the major part of the burgesses thought right to elect and chuse, and that the defendant before the said mayor and bailiffs was sworn in, and by that warrant, &c. Second, that by letters patent, dated 30th *June*, 3 *Edw.* 6, that king granted to the burgesses and residents within the town and borough, that they might elect out of themselves one mayor and two bailiffs, &c. (with other provisions set out in the plea), which said letters patent were accepted and are the governing charter of the town and borough. That from thence hitherto the lawful mode of electing burgesses hath been as follows:—That the mayor, bailiffs, and burgesses, or the mayor and one bailiff, and so many of the burgesses as had a mind to be present, being assembled for that purpose, at a certain court holden before the mayor and bailiffs, or the mayor and one of the bailiffs, or the major part so assembled (*notice having been given of holding such court by the ringing of a certain bell within the town and borough aforesaid*), have been used and accustomed to elect and chuse, at their discretions, such person or persons as they have thought fit to the office or offices of a burgess or burgesses, and that the burgess and burgesses so elected have been used and accustomed to be sworn in; and that on the 24th day of *July*, 1820, *C. H.*, mayor, and *H. H.* and

H. S., bailiffs, and such of the burgesses as had a mind to be present, met and assembled according to the usage and custom, before the said mayor and bailiffs, according to the custom of the said court, for the election of burgesses (*notice having been given of holding the said court by the ringing of the said bell within the town and borough aforesaid*); that the major part of the mayor, bailiffs and burgesses, then and there so met and assembled, did elect and chuse the defendant to be a burgess, he being such a person as the major part thought right to elect, and that being so elected he was sworn in, and by that warrant, &c. Third, also referring to the said letters patent, and stating that they were accepted, and that they contained no grant, power, authority, direction, or provision, concerning the election or swearing in of burgesses, or the manner in which burgesses should be nominated, elected, appointed or sworn in; and that on the 24th day of *July*, 1820, *C. H.* being mayor, and *H. H.* and *H. S.* being bailiffs, the said mayor and bailiffs, and such of the burgesses who had a mind to be present, assembled together, for the election of burgesses, (*notice having been given of holding the said court by ringing of a certain bell within the said town and borough)*; and that the major part of the mayor, bailiffs, and burgesses present, did then and there elect and chuse the defendant to be a burgess, he being such a person as they thought right to elect, and that being so elected the said defendant was sworn in. Fourth, that *Monmouth* is an ancient town and borough, and that the burgesses are a corporation, and that there is an indefinite number of burgesses, and that within the said town and borough there is a certain ancient and laudable custom, that the burgesses, or so many as have a mind to be present, being assembled at a meeting of the said corporation, have chosen and elected at their discretion, such person or persons as the burgesses or the major part of them thought fit to the office or offices of a burgess or burgesses, and that *notice of holding such meeting hath been given and ought to have been given by the ringing of a certain bell within the*

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town and borough, and that the burgess or burgesses so chosen and elected have been sworn in; and that on the 24th day of *July*, 1820, such of the burgesses as had a mind to be present, assembled before *C. H.*, mayor, and *H. H.* and *H. S.*, bailiffs, according to the custom, for the election of burgesses, and that *notice of the holding of the meeting was given by the ringing of the said bell according to the said custom*, and that the major part of the burgesses did at such meeting then and there chuse and elect the defendant to be a burgess, he being such a person as they thought right to elect, and that the defendant being so chosen was sworn in before the said mayor and bailiffs, and by that warrant, &c. Fifth, reciting the letters patent of *Edw.* 6. whereby that king granted that the burgesses should have a mayor and two bailiffs (with other provisions set out in the plea); that the letters patent were accepted, and that from thence hitherto, the lawful mode of electing and swearing in burgesses of the town and borough hath been as follows:—That the mayor, bailiffs, and so many of the burgesses having a mind to be present, being assembled (notice having been given of such meeting and assembly by the ringing of a certain bell) have been used and accustomed to elect and chuse such persons as they, or the major part of them, thought fit, to the office or offices of a burgess or burgesses, who have been used and accustomed to be sworn in, and that on the 24th day of *July*, 1820, *C. H.*, mayor, and *H. H.* and *H. S.*, bailiffs, and such of the burgesses as had a mind to be present, assembled together, according to the custom, for the election of burgesses, (notice having been given of holding such meeting and assembly by the ringing of the said bell) and that the major part of the mayor, bailiffs and burgesses, did elect the said defendant to be a burgess, he being such a person as they thought right to elect, and that being so elected the said defendant was sworn in, and by that warrant, &c. Sixth, that *Edw.* 6. did by his letters patent grant, as in the said fifth plea is mentioned, and that they were accepted, and that they contained no grant, power,

authority, direction, or provision, touching the electing or swearing in of burgesses; and that on the 24th day of *July*, 1820, *C. H.*, mayor, and *H. H.* and *H. S.*, bailiffs, and such of the burgesses as had a mind to be present, assembled together for the election of burgesses, notice having been given of such meeting and assembly by the ringing of a certain bell, and that the major part elected and chose the said defendant to be a burgess, the said defendant being such a person as they thought right to elect, and the defendant being so elected was afterwards sworn in, and by that warrant, &c. Seventh, that *Monmouth* is an ancient town and borough, and that the burgesses are a body corporate, and there is also an indefinite number of burgesses, and that there is, within the said town and borough, a custom that a court hath been holden before the mayor and bailiffs, or the mayor and one bailiff, on every *Monday* throughout the year, and that the burgesses, or so many as had a mind to be present, have had a right to be present, and that the burgesses *met and assembled for that purpose* at the said court, or the major part so assembled, had been used and accustomed to elect and chuse at their discretion such person or persons as they have thought fit to the office or offices of burgess or burgesses, who have been used and accustomed to be sworn in, and that on the 24th day of *July*, 1820, (being on a *Monday*) the said court was holden before *C. H.*, mayor, *H. H.* and *H. S.*, bailiffs, according to the custom for the election of burgesses, and that the major part of the burgesses did elect and chuse the defendant to be a burgess, he being such a person as they thought right to elect, and that the defendant being so elected was sworn in, and by that warrant, &c. Eighth, that *Edw.* 6. by his letters patent granted, as in the fifth plea is mentioned, which letters patent were accepted; that they contain no grant, &c. concerning the electing or swearing in of burgesses; "that afterwards, to wit, on *Monday* next after the feast of *Saint Michael the archangel*, in the 5th year of *Edw.* 6. the then mayor, bailiffs and burgesses of the said town and borough, did, in due

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manner meet and assemble together in the Guildhall in and for the said town and borough, and did then and there, for the good government of the said town and borough, and for the due and convenient election of burgesses of and for the said town and borough, make, constitute and ordain, a good wholesome and reasonable bye-law, (not now extant in writing) whereby it was ordered, resolved and provided, that in all time to come, notice of a meeting of the mayor, bailiffs and burgesses, of and for the said town and borough for the electing of burgesses of and for the said town and borough, should be given by the ringing of a certain bell within the said town and borough, and that after such notice the mayor, bailiffs and burgesses, or the mayor and one of the bailiffs, and so many of the burgesses as, upon the ringing of the said bell, should be willing and minded to be present, should meet and assemble together in the Guildhall of and for the said town and borough, for the election of burgesses of and for the said town and borough; and that the said mayor, bailiffs and burgesses, or the mayor, bailiff or bailiffs, and burgesses, or the major part of them, so met and assembled together, should, at their discretion, elect and chuse such person and persons as they should think fit to be a burgess or burgesses of the said town and borough, which bye-law still remains in force and effect, not repealed, revoked or altered;" and that on the 24th of *July*, 1820, notice of a meeting for the election of burgesses, pursuant to the said bye-law, was given by ringing the said bell, and that after such notice *C. H.*, mayor, and *H. H.* and *H. S.*, bailiffs, and such of the burgesses as had a mind to be present, assembled together for the election of burgesses, and that the major part of the mayor, bailiffs and burgesses, did elect and chuse the said defendant, he being such a person as the major part thought right to elect, and being so elected, the said defendant was sworn in, and by that warrant, &c. To these pleas there were forty-nine general replications, traversing the allegations in the pleas, and issues were joined on all. The first special replication to the first

plea alleged that the bell in the first plea mentioned was and is a bell in the Guildhall of the said town and borough; that the liberties of the said town and borough, in divers directions, were and are to a great extent, to wit, to the extent of divers, to wit, three miles from the Guildhall of the said town and borough; that divers, to wit, twenty of the burgesses of the said town and borough reside and dwell out of the said town of *Monmouth*, and within the liberties of the said town and borough, at a great distance, to wit, the distance of three miles from the Guildhall of the said town and borough; that the said bell, and the ringing thereof, could not be heard at all times throughout the whole liberties of the said town and borough, so as to give notice to all the burgesses residing and dwelling therein; that the notice of holding the said court by ringing the said bell, in the said plea mentioned, was not given to, nor could the ringing of the said bell be heard, by divers, to wit, twenty burgesses residing and being within the liberties of the said town and borough, who were willing and would have had a mind to be present and attend at the said court so holden, as in the said first plea mentioned, whereat the said defendant was so elected and chosen as aforesaid, to wit, at &c. and this &c. Second special replication, that the said bell is fixed at the top of the Guildhall, and that the liberties are to a great extent from the Guildhall, and that divers burgesses reside and dwell out of the town within the liberties, and at a distance from the Guildhall, and that the bell was not rung in proper and sufficient time before the holding of the said court, to give due notice of holding the said court to all the burgesses residing and being within the liberties, who had a right to be present at the court whereat the said defendant was so elected and chosen. Third special replication, that notice given of holding the said court, by ringing the said bell, was not a due and sufficient notice in that behalf. The special replications to the five following pleas and the eighth were similar. The special replications to the seventh plea were,

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first, that the said court, in the seventh plea mentioned, was and is a court at which the burgesses are not bound to attend as burgesses, and hath been used and accustomed to be holden for other business than such as relates to the electing and chusing of burgesses, and that due and sufficient notice was not given of the court being about to be holden for the purpose of electing and chusing of burgesses; and second, that the burgesses, so met and assembled together at the said court were not met and assembled for the electing and chusing of burgesses. Rejoinder to the second special replication to the first plea, "that notice was given according to the said custom in that plea mentioned, by ringing the said bell, of holding the said court, in and for the said town and borough, in manner and form as defendant in the said first plea alleged," concluding to the country. To the same replication to the second and third pleas, "that the said bell, in that plea mentioned, was in due manner rung to give notice of holding the said court, in those pleas mentioned." To the same replication to the fourth, "that notice was given, according to the custom in that plea mentioned, by ringing the said bell, of holding the said meeting, so holden as in that plea mentioned, whereat the said defendant was so elected and chosen as aforesaid." To the same replication to the fifth and sixth pleas, "that the said bell was in due manner rung to give notice of holding the said meeting and assembly." To the first replication to the seventh plea, "that the said court, in that plea mentioned, was and is a court which the burgesses of the said town and borough are bound to attend as burgesses." To the second special replication to the eighth plea, "that notice of the said meeting for the election of burgesses, in that plea mentioned, was given according to the form and effect of the bye-law in that plea mentioned, by ringing the said bell therein mentioned." General demurrer to the first and third special replications; to the first, second, third, fourth, fifth, sixth, and eighth pleas, and to the second special replication to the seventh plea. Demurrer to the first rejoinder, assigning for causes,

that the defendant hath not denied or traversed any matter in the replication, nor confessed, nor avoided, nor in any manner answered the same, and for that the defendant hath pleaded new matter in his said rejoinder, to wit, that notice was given according to the said custom, in the first plea mentioned, by ringing the said bell, of holding the said court, and yet hath concluded to the country. Demurrer to the other rejoinders, for the same causes, and joinder in demurrer.

Campbell, in support of the demurrer to the replications. It is alleged in the first plea, that the borough of *Monmouth* is an ancient corporation, and that there has been an immemorial custom within the borough of electing burgesses, at a court held in pursuance of a notice given by the ringing of a bell. In the replication to that plea it is stated, for the first time, that there are *liberties* belonging to the borough, and that the bell cannot be heard at all times, so as to give notice to all the burgesses resident therein. The question therefore is, whether this plea is sufficiently answered by shewing that the bell cannot be heard, on all such occasions, throughout the borough and its liberties. It seems to be settled that a personal summons to attend corporate meetings is not necessary where the corporators form an indefinite body. Here the burgesses are an indefinite body, and consequently a personal summons is unnecessary. A personal summons is nowhere necessary except for the meeting of the select body of the corporation. But even where a member of the select body has left the town, a personal summons is not requisite; *Rex* v. *Grimes* (*a*). It is admitted that in the case of the select body, there must not only be a personal summons, but the summons must contain a notice of the object or purpose for which the meeting is to take place, if the meeting be not on the charter day: *Rex* v. *Carlisle* (*b*), *Rex* v. *Liverpool* (*c*), *Rex* v. *Doncaster* (*d*), *Musgrove* v. *Nevinson* (*e*). Even in the case of a select body,

(*a*) 5 Burr. 2598. (*b*) 1 Stra. 384. (*c*) 2 Burr. 723.
(*d*) Id. 738. (*e*) 2 Ld. Raym. 1358.

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if all the members are present, and agree in the proceeding, a personal service of summons may be dispensed with, unless the charter expressly says otherwise, as was decided in *Rex* v. *Theodorick* (*a*). These cases, therefore, cannot be pressed as authorities against the sufficiency of these pleas, to which they are wholly inapplicable. It is alleged here that the notice by ringing the bell is the immemorial mode of assembling the burgesses, and consequently a notice in any other manner would be insufficient. Any unusual mode would be a departure from the custom, and therefore bad. Assuming that the bell, in this instance, could not be heard all over the borough, still it would be sufficient, because it is stated to be the immemorial mode, and any other notice substituted in lieu of it could not be resorted to; *Rex* v. *May* and *Rex* v. *Little* (*b*). Suppose the crown had granted a charter directing such a notice to be given, could that be gainsaid? If not, then, as this is stated to be the mode by immemorial custom, the presumption is, that this corporation had originally a charter directing this mode of giving notice. [*Bayley*, J. The strong pressure of the argument on the other side will be, that the pleas do not state how long the bell was to be rung, nor how long a time was to elapse before the election commenced. The notice by ringing a bell may be applicable to various other purposes; and how are the burgesses to know that on each occasion the bell is to assemble them for the purpose of electing burgesses?] These objections, if tenable, ought to have been put on the record, by way of replication, and then there might have been an issue of fact whether the notice was given according to the custom. But the notice itself, by ringing the bell, being pleaded as an ancient and immemorial custom, every presumption must be made in its favour. It is not necessary that the bell should be heard throughout the liberties of the borough, in order to support the reasonableness of the custom; it is sufficient if it be heard within the borough, and that is admitted by the pleadings. The

(*a*) 8 East, 543. (*b*) 5 Burr. 2681.

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liberties are no part of the borough. It may be presumed that *Monmouth* was anciently a walled town, and that all the burgage tenements were within the borough, and if so, then, according to *Co. Lit.* b. 2. c. 10. s. 162. the liberties are no part of the borough. The liberties here are merely in grant. They are given as franchises, and may be only granted with a view to the jurisdiction of the borough justices, or for other collateral purposes, quite independent of the rights of individual corporators. That the King may grant such franchises is laid down in *Com. Dig.* Prerogative, D. 29, *Talbott* v. *Hubb* (*a*). These are authorities to shew that the King may extend the franchises of the borough into a foreign county, but that would not necessarily make the franchises part of the borough. Suppose here that the liberties extended many miles beyond the borough, could it be said that if the bell was not heard to the utmost limits, the custom must not prevail? That the liberties are quite distinct from the borough is laid down in *Long's* case (*b*) and *Blankley* v. *Winstanley* (*c*); and with regard to the presumption that all the inhabitants live, and that the burgage tenements are, within the borough, *Co. Litt.* b. 2. c. 10. ss. 162. 164. 165. and 2 *Bl. Com.* 82. are authorities. It appears, therefore, that the liberties are no parcel of the borough, and as it is not denied that the bell was heard within the borough itself, then the first special replication is bad, for it admits that the ringing of the bell is a sufficient notice within the borough. For the same reason the second special replication is bad also, for it admits that the notice was sufficient for those burgesses residing within the borough, but not for those within the liberties; but as it is not necessary it should be heard within the liberties, that replication is no answer to the plea. The third special replication is still more objectionable, for it simply alleges that the notice given of holding the said court, by ringing the bell, "was not a due and sufficient notice in that behalf;" which raises an issue of law and not of fact; and it is well settled that such a repli-

(*a*) Stra. 1154. (*b*) 5 Rep. 121. (*c*) 3 T. R. 279.

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cation is bad: *Rex* v. *Portreeve of Honiton* (*a*). It is unnecessary to advert particularly to the fourth, fifth, and sixth pleas. The seventh plea alleges that there has been an ancient and laudable custom to hold a court on every *Monday* throughout the year, and that the burgesses *being met and assembled for that purpose*, have been used and accustomed to elect such persons as they thought fit to the office of a burgess of the borough. [*Bayley*, J. But you do not bring yourself within your own custom. You do not say that they were assembled for the purpose of electing, in this instance. Part of the custom alleged is, that the burgesses of the borough for the time being, or so many of them, being willing to attend, *being met and assembled for that purpose*, &c. did elect. This does not shew that they were previously warned that there was to be a court for that purpose. You do not say that they met and assembled for the purpose of electing, but that being *so met and assembled together*, they elected the defendant.] The custom is, that there is to be a court holden for the election of burgesses on every *Monday* throughout the year, and therefore it is submitted that every *Monday* in the year must be considered as a charter day, on which every burgess is bound to attend without notice. [*Bayley*, J. It is nowhere stated that they are all bound to attend. Your custom is, that so many of the burgesses as have been willing, and minded to be present, have attended.] It is settled that on a charter day there may be an election of corporate officers without previous summons of the corporators. Here the *Monday* must, by custom, be considered as a charter day. [*Bayley*, J. In this plea it is by no means to be presumed that no previous summons was necessary for the purpose of electing burgesses, especially as the *Monday's* court may be held for other purposes. The objection is, that this particular court is not shewn to have been held *for the purpose* of election, and consequently you do not bring yourself within the custom pleaded. *Littledale*, J. You must bring yourself within the terms of

(*a*) Selw. N.P. 1086.

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the custom; or you must at least shew that there was something tantamount to a meeting and assemblage *for the purpose* of election; but this is not shewn.] The special replication to this plea alleges that the burgesses were not in due manner met and assembled for the electing and chusing of burgesses. Now there would be no difficulty in taking issue upon that replication, because it could be shewn that the burgesses were assembled, in due manner, by ringing the bell. [*Littledale*, J. But "due manner" must mean according to the allegation of the custom; if you have not brought yourself within the custom, then it cannot be said that the defendant was in due manner elected.] The eighth plea is, at all events, not open to these objections. It sets out an ancient bye-law for the regulation of the election of burgesses, and the plea brings the case by proper averments within the provisions of the bye-law, and as the replications to this plea are insufficient, for the reasons already urged as to the other replications, the defendant is clearly entitled to judgment on the eighth plea.

G. R. Cross, contrà, was stopped by the Court.

BAYLEY, J.—I am of opinion that none of these pleas are good in point of law, and therefore it is quite immaterial to consider whether the replications are or are not sufficient. Where there is an election of burgesses to take place either by charter or custom, on a specific day, it is the bounden duty of every person entitled to vote at such election, to take notice, that the election will take place on that day, and that it is to be the first business entered upon when the parties meet. But where no specific day is fixed by charter or custom for the election of burgesses, and such business may be done on many days in the course of the year, I take it to be essential that notice should be communicated to the different persons resident within the borough, entitled to have a voice in the election, and that it should be a reasonable notice, given at such an interval before the period of

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time at which the election is to take place, as to give to every person entitled to vote, an opportunity of preparing himself for attendance at the meeting. It appears to me that the notice stated in the pleas in this case, by the ringing of a bell, (which may be rung for a great many other purposes,) that the corporation is about to proceed directly to the election of burgesses, is not such a reasonable notice as the law requires. In some of his pleas the defendant relies upon an immemorial custom, and in others upon an usage which has prevailed in the borough since the charter of *Edw.* 6. was granted. The first plea is founded on the custom, and states that from time to time a court has been holden, among other things, for the election of burgesses, and that notice has been given by ringing the bell. But it does not state on what particular days, or at what hours the court is to be holden, nor that the burgesses are to be elected at every court, nor at what period of the day the election is to take place. The custom is silent also as to the time during which the bell must ring, and how long an interval must elapse after the ringing before the election is closed. What an opportunity this gives for surprize, collusion and fraud! Suppose an individual wishing to gain his election by undue means says, "I have watched particular voters out of the town; I know they would vote against me; I know also that some voters cannot come to the poll time enough; I will therefore have the bell rung, and all my friends will know what to do." Suppose the bell is rung so early in the morning that persons who hear it, and are desirous of voting, cannot be up time enough, and find the election over before they arrive. Such a custom might, in many instances, be abused. I do not say that such was the case in the present instance, but in trying the validity of a custom, we are to see to what abuses it may possibly lead. Now, if this custom might lead to practices such as I have mentioned, undoubtedly the law says, it is not a reasonable custom. In order to make it a reasonable custom, the parties entitled to vote ought to be apprized either by ringing

a bell, or in some other distinct manner, that there is to be an election of burgesses on the particular day, and there should be such an interval between the time when the notice is given, and the time when the election takes place, as will give to every voter an opportunity of getting to the poll before the election commences and concludes. I should say that even if you gave a verbal notice to every man that the election was now beginning, and that they must all go instanter, that would not be sufficient; because the party must have a reasonable time for preparing to attend the election; he is not to set aside all other business and proceed instantaneously to the Guildhall. If such a notice would be bad, à fortiori, that mentioned in the first plea would be a bad notice. The second plea sets out a charter granted by *Edw.* 6, and states that from the time of that charter the lawful mode of electing burgesses is this: "that the mayor, bailiff, and burgesses, being met and assembled for that purpose, at a certain court, according to the custom, or the major part of them so assembled and present, (notice having been given of holding such court by the ringing of the said bell within the town and borough aforesaid,) have elected, &c." Now it seems to me that by law, where a corporation has an indefinite day, or many unfixed days for the election of burgesses, the burgesses cannot be said to be properly met and assembled for the purpose of election unless there has been a general notice given throughout the whole borough, for what the meeting is to be, and the time at which it is to be held; and omitting to give such a notice to any one person, unless all the burgesses should happen to be present and consenting, would make it a bad and invalid meeting for the purpose of electing burgesses. These objections are equally applicable to the third and fourth pleas, for nothing is there said as to the time during which the bell shall continue ringing, or how long a time is to elapse after it has ceased ringing, before the election is to commence. Much reliance is placed in argument upon the fifth plea, but that differs from the second only in stating

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the mode of election to have been by the burgesses "met and assembled for that purpose at the Guildhall," instead of "at a certain court holden, &c." Now, assuming that each of the burgesses present would have received a notice "for that purpose," it does not follow that because they had met for that purpose, it would be a legal assembly, because unless there was notice given to every other member of the corporation resident within the limits of the borough, although those other persons might have assembled for the purpose, it would not be a legal meeting. The notice is said to be "of such meeting and assembly by ringing a certain bell." There may be some difficulty in understanding this; there may be an intentional duplicity in it, in order that you might seem to express one thing when you really meant something else. It appears to me, therefore, that this plea also cannot be supported in point of law. The sixth plea is bad for the same reasons as the others, because it imports only that notice was given to some but not all the burgesses. Then, as to the seventh plea, I think that also cannot be supported, first, because the custom on which it is founded is bad in point of law, and second, that supposing it to be a good custom, the defendant has not brought himself within it. According to the custom there is a *Monday's* court held fifty-two times in the year. Now the purpose for which the court is to be held is not stated at all as part of the custom, but it is stated "that the burgesses for the time being, or so many of the burgesses for the time being, being willing, and having a mind to be present, *being met and assembled for that purpose* at the said court, have elected and chosen, and during the whole time last aforesaid have been used and accustomed to elect and chuse at their discretion, such person or persons as the major part of them so assembled have thought fit." They are to be met and assembled *for that purpose*. If all had notice it would be a good meeting and assembly, but they must meet *for the purpose*, and according to the authorities upon corporation I apprehend that in all cases where a particular day is

fixed upon, which is not ordained by the charter, there must be a notice to all the burgesses that the meeting is for the purpose intended. The averment, therefore, that the court had assembled *for that purpose*, would not be sufficient unless such a notice had been given. This plea does not import upon the face of it that there had been any such notice. Then how does this defendant bring himself within the custom? He does not say "that being so met and assembled *for that purpose*, the major part of the burgesses elected him," and therefore assuming it to be a good plea he has not brought himself within the custom. But there is another answer given to this plea by the replication, which denies that the meeting was assembled *in due manner* for the purpose of electing burgesses. The words "in due manner" mean in such a manner as the law will allow; and therefore the court is not met in due manner, unless it is assembled *for that purpose*. It seems to me, therefore, that these different pleas cannot be supported, and we have thought it much better to give our opinion upon them at once, in order to save the parties the great expense of trying no less than forty-nine issues. With respect to the bye-law set out in the eighth plea, I have no difficulty in saying that it is bad in point of law. It is open to the same objections that I have already noticed as applicable to the custom set out in the other pleas; for, independently of the indistinctness of communication as to the purpose of ringing the bell, it is also defective for not specifying the period of time during which the bell is to be rung, and the length of time that is to elapse before the election commences. It would certainly lead to the consequences I have already pointed out, by enabling a party to take certain burgesses by surprise, by having the bell rung at a period when he was sure of carrying his election. For these reasons I am of opinion that judgment must be given for the crown.

Holroyd, J. and Littledale, J. concurred for the like reasons.

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Campbell applied for leave to amend the pleas upon payment of costs, but

The Court said the general rule was not to allow of amendments after argument. If, however, he could produce an affidavit of the grounds on which he moved, the Court would consider whether he might have a rule to shew cause.

Judgment for the crown.

Rohde and another v. Proctor and another.

The drawer of a bill absconded, and was made a bankrupt before the bill was due. His house continued open, and in the possession of the messenger under the commission, after the bill was due. The holder knew of the appointment of *A.* and *B.* as the drawer's assignees before the bill was due. The acceptor became bankrupt before the bill was due. The holder neither gave, nor made any attempt to give, notice, either to the drawer or to his assignees:— Held, that he was guilty of laches; that his claim against the drawer was barred; and, consequently, that he had no right to prove the bills under his, the drawer's, commission.

FEIGNED issue, directed by the Vice-Chancellor, to try the question whether, on the 10th of *May*, 1821, there was any debt due under and by virtue of five several bills of exchange, set forth in the declaration, drawn by one *John Soady Rains* upon and accepted by one *Joseph Lacklan*, or any of them, which debt was proveable by the plaintiffs, as assignees of *Sawyer, Jobler* and Co., the indorsees of the said bills, under a commission of bankrupt issued against the said *J. S. Rains*. At the trial before *Abbott*, C. J. the jury found a verdict for the plaintiffs, stating that there was a debt under and by virtue of the said bills of exchange, which was proveable by them under the commission against *Rains*. Upon motion by the defendants before the Lord Chancellor for a new trial, his lordship directed the following case to be sent for the opinion of this Court:

The five bills of exchange, set forth in the declaration, became due in the month of *June*, 1818. The drawer, *J. S. Rains*, left his dwelling-house on or about the 17th of *April*, 1818, and absconded and went abroad, and never returned. On the 20th of *April*, 1818, a commission of bankrupt issued against him, under which the defendants were duly chosen assignees, and the bankrupt's effects were assigned to them previously to the time when the said bills

of exchange became due. The bankrupt did not surrender to his commission; the time for which surrender was limited to the 23d of *June*, 1818. The bankrupt's house remained open, in the possession of the messenger under the commission, for some time after the bills were due. The acceptor became bankrupt on the 23d of *April*, 1818, and the bills were dishonored when they became due, but no notice of the dishonor was given to the drawer or left at his house. The holders of the bills had notice before the bills became due, that the defendants had been chosen assignees of the estate and effects of *Rains*, but no notice of the dishonor of the bills was given, or attempted to be given, to the defendants. The commission of bankrupt against *Sawyer, Jobler* and Co. issued on the 29th of *October*, 1818, and the plaintiffs are their assignees and the holders of the bills. The question for the opinion of the Court is, whether, under these circumstances, the bills were proveable under the commission issued against the drawer.

F. Pollock, for the plaintiffs. The plaintiffs are the assignees of the holders of the bills, and as such are entitled to prove the amount under the commission against the drawer. The bills were running when the drawer became bankrupt; he absconded before they became due: personal notice to him, therefore, of the dishonor of the bills, was impracticable, and consequently unnecessary. If he had merely absconded for a time, and had not been made a bankrupt, but had returned, the plaintiffs might have sued him upon the bills, and want of notice of their dishonor would have been no answer to that action. Then, if notice was not necessary to the drawer himself, à fortiori it was not necessary to the defendants as his assignees. If the drawer had a right to notice, it would not pass to his assignees, for they are not his representatives for that purpose, and no case can be found in which they have been held entitled to notice under such circumstances. There are, no doubt, cases in which it has been held that the

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bankruptcy of the drawer constitutes no excuse for neglecting to present a bill for acceptance or payment, or neglecting to give due notice of its non-acceptance or non-payment; but that is because many means may remain of obtaining payment by the assistance of friends or otherwise, of which it is reasonable the drawer should have opportunity to avail himself (*a*). But assignees do not come within the reason and principle of the rule, because they do not stand in the same relation to the bill as the drawer; they are merely trustees for the purpose of collecting the assets of the bankrupt, and dividing them among his creditors. If these defendants are entitled to notice, the assignees under a voluntary assignment for the benefit of creditors would be entitled also; which would be a perfectly novel proposition. The ground for requiring notice is to enable the party to withdraw his funds from the hands of the acceptor; which cannot apply to the assignees of a bankrupt, because they are bound, virtute officii, to collect all the funds, wherever deposited, with the least possible delay.

Tindal, contrà. The holders made these bills their own by their negligence in omitting to give notice of their dishonor, first, to the drawer, and secondly, to his assignees. The case does not find as a fact that the holders of the bills knew of the drawer having absconded. The general rule is, that notice of the dishonor of a bill must be given to the drawer, and though there are some exceptions to the rule, still a party must bring himself clearly within one of them, before he can relieve himself from the obligation. At all events, and under any circumstances, he must use diligence in the attempt to give notice; without that he can never be excused: *Russell* v. *Langstaffe* (*b*), *Esdaile* v. *Sowerby* (*c*), *Bateman* v. *Joseph* (*d*), *Beveridge* v. *Burgess* (*e*), *Crosse* v.

(*a*) Vide *Russell* v. *Langstaffe*, Doug. 514; *Bickerdike* v. *Bollman*, 1 T. R. 405; *Esdaile* v. *Sowerby*, 11 East, 114; *Boultbee* v. *Stubbs*, 18 Vesey, jun. 21.

(*b*) Doug. 514. (*c*) 11 East, 114. (*d*) 2 Camp. 461.

(*e*) 3 Camp. 262.

Smith (*a*), and *Goldsmith* v. *Bland* (*b*). Here, no such attempt was made, although it might have been: for notice might have been left at the drawer's house, and would probably have reached him if it had. It was, indeed, held in *Brett* v. *Levett* (*c*), that want of notice, to the bankrupt drawer, of the dishonor of a bill, might be supplied by evidence of his acknowledgment to the holder, when asked if the bill would be paid, that he knew it would not; but that does not at all break in upon the general rule as applied to this case, because there is no such supplementary evidence here. Then, secondly, whether notice to the bankrupt drawer was necessary or not, still it was clearly necessary to his assignees. In ex parte *Moline* (*d*), where the bill was dishonored, and the drawer became bankrupt, notice of the dishonor was given to him before his assignees under the commission had been appointed; and that was held sufficient; but for this reason, that until the assignees are appointed, the bankrupt himself represents his estate. The ground, therefore, of that decision, shews that where a bill is dishonored after the drawer has become bankrupt, notice of the dishonor must be given to his assignees. The argument suggested with respect to assignees under a voluntary assignment has no bearing upon the point: they are, absolutely, mere trustees, and can sue only in the name of the assignor: but the assignees of a bankrupt are constituted his representatives by law, and have the power of suing in their own names. Suppose a drawer of a bill dies before the bill is yet due, and his executor resides so near that his place of abode may be fairly presumed to be known to the holder; if the bill is dishonored, must not notice be given to the executor? Most clearly it must. Suppose a decree in Chancery against the executor, compelling him to administer the estate rateably among the creditors, notice would still be necessary; and yet an executor, so situated, would fill precisely the same character as the assignee of a bank-

(*a*) 1 M. & S. 545. (*b*) Bayley on Bills, 224.
(*c*) 13 East, 213. (*d*) 19 Vesey, jun. 216; 1 Rose, 303, S. C.

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rupt. These plaintiffs, therefore, having neither given, nor attempted to give, notice to the drawer or his assignees, do not come within the exceptions from the general rule, but have, by their laches, made the bills their own, and cannot prove their amount under the drawer's commission. A contrary decision would be extremely unjust, for it may be most important to the assignees to receive notice, in order to their being perfectly acquainted with the state of the bankrupt's affairs. [*Bayley*, J. And they may also have an interest in watching the state of the acceptor's affairs.] Certainly; for the acceptor may become bankrupt with funds of the drawer in his hands, and his estate may pay a large dividend before the assignees of the drawer know the fact that the bills will become a charge upon his estate.

F. Pollock, in reply. The law does not call upon a man to attempt to do that, which his situation and circumstances render it morally impossible that he should succeed in doing. But that was the situation of the plaintiffs; therefore, they have been guilty of no laches. The assignees do not, in point of law, represent the person of the bankrupt, but only his estate; they are mere trustees, not personal representatives. Ex parte *Moline* only shews that the notice in that particular case was sufficient; it is no authority for saying, generally, that where the drawer of a bill becomes bankrupt, and the bill is dishonored after assignees are chosen, notice must be given to them. Such a rule would be absurd, for if the commission were afterwards superseded, notice to the assignees would be ineffectual as against the bankrupt. But, at all events, the assignees can claim a right to notice only upon the ground that the bankrupt's estate has sustained some injury, and there is no pretence for saying that the want of notice has produced any such effect in this case.

The case was argued at the sittings after last *Easter* term, when the Court took time to consider of it. Judgment was now delivered by

BAYLEY, J., who, after stating the facts of the case, thus proceeded.—The question arising upon the facts stated in this case, is, whether the want of notice bars the plaintiff's claim; and we are of opinion that it does. The holder of a dishonored bill is bound to use due diligence to give notice to all those parties to the bill who would be entitled to a remedy over upon it if they took it up; and if he neglects to use such diligence, he makes the bill his own, and forfeits his remedy upon it as against all those parties. The chance of obtaining any benefit from the remedy over may be hopeless; the parties against whom the remedy would lie may be insolvent, or bankrupt, or may have absconded; but that is no excuse for the holder; because the parties are entitled to have the chance, and if they are deprived of it, the law, which in this respect is founded upon the usage and custom of merchants, holds them discharged. If, therefore, there is a want of due diligence here, the bankruptcy of *Lacklan* does not excuse it, and the question must be decided just the same as if he had remained solvent. Now, if *Lacklan* had remained solvent, and the assignees of *Rains* had received notice of the dishonor of the bill, they might have pressed *Lacklan* for payment, or, if they had chosen to take up the bill, might have sued him upon it. But of those remedies they have been deprived, and the only question is, whether they have been so deprived by means of the want of due diligence on the part of the holders. In answering that question it is not necessary to decide whether, when a party entitled to notice becomes bankrupt, the holder is bound to endeavour to discover his assignees: neither is it necessary to decide what would be the duty of the holder if the house of such a party were shut up, himself absconded, and his representatives not to be found; for here the bankrupt's house remained open, and the messenger, who is his representative, or at least the agent of his representatives, was in it; so that a notice left there would have reached the assignees, and would have enabled them to decide what course they would pursue as against *Lacklan*. It is laid

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down in *Thompson's* excellent modern Treatise upon the Law of Bills of Exchange, page 535, in which the *Scotch* and *English* law upon the subject are combined, that where the drawer or indorser becomes bankrupt, notice must nevertheless be given to him, or to the trustee vested with his estate for the behoof of his creditors; and ex parte *Moline* is, among other cases, cited as an authority in point. Whether the rule is so in all cases, we need not decide; all that we need decide in this case is, that where the bankrupt's house remains open, and the agent of the assignees in it, notice is necessary, and the want of it bars the holder's claim against the bankrupt's estate. That being so, it follows that these bills were not proveable under the commission against the drawer, and, consequently, our judgment must be for the defendants.

Judgment for the defendants.

The King v. Montague and others.

A river or creek into which the tide flows, is not, therefore, necessarily a public navigation.

A public right of navigation on such a river or creek, may be extinguished either by legal means, as an act of parliament, a writ of ad quod damnum, or an order of commissioners of sewers; or by natural causes, as the retreat of the sea, or a deposit of silt and mud.

Where a public road, obstructing a creek once navigable, has existed beyond living memory, the law will presume that the public right of navigation has been destroyed by some one of the means above mentioned.

THIS was an indictment for cutting a trench across an ancient and common King's highway, leading from the parish of *Hoo* in the county of *Kent*, unto and through the parish of *Stoke* in the same county, and from thence unto and into the parish of *Saint James* in the *Isle of Grain* in the same county, used for all the King's subjects with their horses, carts, carriages, &c. Plea, not guilty. At the trial before *Graham*, B. at the last Summer assizes for *Surrey*, into which county the indictment had been removed for trial by an order of this Court, the case proved in evidence was this. The alleged highway consisted of an embankment running

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across *Yantlett Creek*, which runs along the west side of the *Isle of Grain*, uniting the rivers *Thames* and *Medway*. The corporation of *London* contended that *Yantlett Creek* was a public navigable stream, and that the alleged highway obstructed it, and the defendants by their order cut away the embankment. The embankment had from time to time during the last twenty years been raised by the inhabitants of *Stoke* and *Grain*, and to such a height that during all that period no boats could pass over it at any time; but during the thirty or forty years preceding, light boats which drew very little water had occasionally passed over during about half an hour both before and after high water. Upon removing the embankment the remains of an ancient bridge were discovered. Its dimensions appeared to have been considerable, both in height and width, but there were no means of ascertaining when it was built, when it fell into decay, or for what purpose it was designed, whether to assist the navigation of *Yantlett Creek*, or to support the road from *Stoke* to *Grain*. It was contended on the part of the defendants that as the arch was of a size sufficient for navigation, and more than sufficient for the support of the road, the bridge must be presumed to have been built so as not to obstruct the navigation; and that if there had ever been a public navigation along *Yantlett Creek*, that could not be legally extinguished except by act of parliament. The learned judge told the jury there was ground for presuming that there had formerly been a public navigation along *Yantlett Creek*, but that it had in all probability been obstructed by a natural deposit of silt and mud, and the bridge might for that reason have been allowed to fall to decay, and the embankment have been made instead of it. The only proof of navigation was by very small craft at very short periods of the tide, and therefore the defendants could only be entitled to remove so much of the embankment as would open a navigation to that extent, and were not at all events justified in wholly removing it, as they had done. Under this direction the jury found the defendants guilty.

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Gurney in *Michaelmas* term last obtained a rule nisi for a new trial upon the ground of misdirection.

Marryat, (with whom were *D. Pollock* and *Platt*,) against the rule, was stopped by the Court.

Gurney, the *Recorder* of *London*, the *Common Serjeant*, *Bolland*, *Tindal*, *Law*, and *Mirehouse*, were heard in support of the rule.

Bayley, J.—I am of opinion that the verdict found in this case ought not to be disturbed. It has been argued that the learned judge ought to have left it to the jury to say whether there had or had not been a public navigation along *Yantlett Creek;* but he seems to me, instead of prejudicing the defendants in this respect, to have put the case much more favorably for them, for the whole of his charge to the jury proceeded upon the assumption, that at some very distant period there had been such a navigation. But assuming the summing up to have been defective in this particular, still, if we are satisfied upon the evidence now before us, either that there never was any public navigation, or that it has been legally extinguished, we ought not to grant a new trial. Now there are cases to shew that not every place in which the tide ebbs and flows is necessarily a public navigation, although its size is sufficient for the purpose. The first of these is *The Mayor of Lynn* v. *Turner* (a). "That was error from a judgment in the Court of Common Pleas, in an action upon the case against the corporation of *Lynn Regis*, for not repairing and cleansing a certain creek or fleet, called *Dowshill Fleet*, into which the tide of the sea was accustomed to flow and reflow, as from time immemorial they had been used, whereby the sea was prevented from flowing therein, so that the said creek was rendered unnavigable, and the plaintiff obliged to carry his corn round about. The second count stated no special damage, but

(a) Cowp. 86.

only charged, generally, that the plaintiff lost the use of his navigation. Judgment by nihil dicit, and damages upon a writ of inquiry. For the plaintiff in error it was contended that if any one count was bad, the judgment might be set aside: and it was urged that, upon the face of this record, it appeared that the locus in quo was a navigable river, where the tide flows and reflows; and the second count was general, without any special damage being stated; that, if so, the injury complained of was not the subject of an action, but of an indictment; for, wherever a river flows and reflows, it is in the nature of a highway, and is common to all. Lord *Mansfield*, Ex facto oritur jus. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate." So in *Miles* v. *Rose* (*a*), *Gibbs*, C. J. said, "The flowing of the tide, though not absolutely inconsistent with a right of private property in the creek, is strong *primâ facie* evidence of its being a public navigable river;" and *Heath*, J. said, "The flux and reflux of the tide is strong *primâ facie* evidence that this was a navigable river." Then how is this *primâ facie* evidence, for it is no more, which arises out of the flux and reflux of the tide, to be estimated? By the situation and nature of the channel; that is the true criterion. If the channel is broad and deep, and calculated for the purpose of commerce, the natural inference must be, that it has been a public navigation; but if it is small, shallow, and navigable only for short periods, at particular times of the tide, and by small vessels, the almost inevitable conclusion is that it never has been a public navigation. Now the latter description applies to the creek in question, and all the evidence in the case goes to negative the idea of there ever having been a public navigation along it. (Here the learned judge recapitulated and commented upon the evidence at considerable length). But, assuming that this

(*a*) 5 Taunt. 85.

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was at some very remote period a public navigation, still, considering the length of time during which it has been obstructed and disused, I think we must now presume that it has been legally extinguished, and the rights of the public in respect of it legally determined. Those rights, if indeed they ever existed, in all probability sprung out of the circumstance that the tide of the sea ebbed and flowed in the creek, so as to make it for some purposes navigable. If the sea retreated, or the creek became choked up by its own deposits of mud, so as to be no longer navigable at all, why should not the rights of the public cease? If natural causes gave existence to those rights, why should not natural causes destroy them? But there are other modes by which they may have ceased. They may have been extinguished by an act of parliament, or by a writ of ad quod damnum, or by the authority of the commissioners of sewers. Upon the whole, it seems to me, that if we were to send this case to a new trial, the jury would probably find, either that there never had been a public navigation along the creek, or that it had been legally extinguished; and in either of those cases the present verdict would be right. I therefore think that this rule must be discharged.

HOLROYD, J.—I am also of opinion that the present verdict is right. The very long enjoyment of the road across the creek fairly gives rise to the presumption that it was legally constructed. The answer to the indictment is that there was a public right of navigation through the creek, and that the road obstructs that navigation. The evidence, which my brother *Bayley* has already so fully examined, strongly leads to the conclusion that there never was any such navigation; but, supposing there once was, still the question remains, may it not have been legally determined? I am reported to have given it as my opinion in the case of *Vooght* v. *Winch* (*a*) that a public right of this nature could not be extinguished except by an act of parliament.

(*a*) 2 B. and A. 670.

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I now feel myself called upon to correct that opinion. I have looked into the authorities upon the subject, and I am now satisfied that a writ of ad quod dammum, and an inquisition found thereon, by a jury, may legally put an end to such a right. It may also clearly be put an end to by natural causes. Lord Chief Baron *Comyn*, in his Digest (*a*), says, "A navigable river is in the nature of a highway, and if the water alters its course, the way alters, per *Thorp*, 22, *Ass.* 93. In the book thus referred to the point is thus stated. "*Et nota, Thorp* saith, If a water be a high street, which water by its own force changes its course upon another soil, yet it shall have there the same high street as it had before in its ancient course, so that the lord of the soil cannot disturb the new course." Nor does *Thorp*, J. adduce that as his own dictum merely, but adds that it was so held in the *Nottingham* case. In that case, therefore, it was held the right of way, existing on account of the navigation of the river, ceased in the original channel when the river changed its course, but followed the river to its new course; and upon the same principle, if the sea retreats so as to leave a creek, formerly navigable, perfectly unnavigable, the rights of the public must be held to cease with the navigation: particularly where, as in the present case, other rights have intervened. With respect to the writ of ad quod dammum, *Fitzherbert* (*b*) says this: "If there be an ancient trench or ditch coming from the sea, by which boats and vessels are to pass to the town, if the same be stopped in any part by outrageousness of the sea, and a man will sue to the King to make a new trench, and to stop the ancient trench, they ought first to sue a writ of ad quod damnum to inquire what damage it will be to the King and others." That such a right may be extinguished by an act of parliament, no lawyer can doubt. Then, considering the evidence of the very long enjoyment of the road in its present state, it seems to me that we are bound to presume, in favour of the existing state of things, either that there

(*a*) Com. Dig. Chemin. (A. 1.)

(*b*) Fitz. Nat. Brev. 515.

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never was a public navigation through this creek, or that it has been determined by some one of the means to which I have alluded: and if so, the defendants have been properly convicted, and there is no ground for making this rule absolute.

Littledale, J.—There are two questions here. First, whether, anciently, there was a continuing subsisting navigation used by the public through the creek; and second, whether that navigation has been determined by legal means. The conviction produced in my mind by the evidence is, that there never was a continuing subsisting navigation used by the public; but, admitting that there was, has it been determined by legal means? Those means may be, either an act of parliament, or a writ of ad quod damnum, or, under certain circumstances, an order of commissioners of sewers. I agree, that, in order to quiet possession, a court of law ought to make every reasonable presumption in favour of the existing state of things; but I, for one, should be unwilling to act upon the presumption either of an act of parliament, or a writ of ad quod damnum, or an order of commissioners of sewers, without some evidence to guide me to that presumption. Nor does it appear to me necessary to do so in the present case. A public right of navigation may be destroyed by natural causes, and I think the most easy and reasonable presumption is, that this navigation, if it ever existed, has been destroyed either by the retreat of the sea, or by its own deposits of silt and mud. Upon the whole, I quite concur in thinking that the verdict ought not to be disturbed.

Rule discharged.

WRIGHT *v.* COURT and others.

A constable, arresting a man on suspicion of felony, is bound to take him before a magistrate as soon as he reasonably can.

A constable has no right to detain a prisoner three days without taking him before a magistrate, in order that evidence may be collected in support of a felony with which he is charged.

A constable has no right to handcuff a prisoner, except he has attempted to escape, or except it is *necessary* in order to prevent his escaping.

DECLARATION in trespass, for false imprisonment, stating, that defendants on 3d *November*, 1824, assaulted plaintiff, and imprisoned him upon a false charge of felony, and kept him so imprisoned for three days, and then handcuffed him and took him before a magistrate, and there imprisoned him again for twelve hours. Pleas, first, not guilty. Second, as to the assaulting and imprisoning plaintiff for the space of time in the declaration first mentioned, and as to the handcuffing and taking him before a magistrate, and imprisoning him there for the space of time in the declaration secondly mentioned, defendants say, that a felony had been committed in the premises of one *Clarke*; that (from certain circumstances set out in the plea) plaintiff was suspected of being concerned in the felony; wherefore defendant *Court*, being a constable, and the other defendants as his assistants, took plaintiff and imprisoned him for the space of time in the declaration mentioned in that behalf, in order to carry him before a magistrate, the same being a reasonable time for that purpose, and for the purpose of informing *Clarke* of the apprehension of plaintiff upon such suspicion, and for the purpose of enabling *Clarke* to procure the necessary evidence and collect the necessary witnesses, to prove the facts of the said felony; and defendants further say, that on &c. they handcuffed plaintiff, as in the said declaration mentioned, in order to prevent his escape, and took him so handcuffed before a magistrate, to be then and there examined touching the said felony, and the magistrate directed him to be detained for further examination; wherefore defendants again imprisoned him for the space of time in the declaration in that behalf mentioned. Other pleas substantially the same. Demurrer to the pleas, and joinder in demurrer.

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Curwood, in support of the demurrer, contended that *no* causes of suspicion would justify the conduct complained of in the declaration, but that at all events the circumstances set out in the pleas were insufficient to form a justification for such conduct.

W. O. Russell, contrà, contended, that the pleas set forth reasonable grounds of suspicion, and such as justified the defendants in the course they had pursued.

BAYLEY, J.—It is difficult to imagine any circumstances under which the conduct of these defendants could be justifiable in point of law, but at all events the circumstances set out on this record are wholly inadequate to furnish them with any justification. The plaintiff alleges that he was first imprisoned for three days, and the defendants by their first special plea admit that he was imprisoned for that space of time before he was taken to a magistrate for examination, and avers that it was a reasonable time for that purpose, and for the purpose of enabling *Clarke* to collect and bring forward evidence in support of the charge of felony. In the first place it was a most unreasonable time for any purpose, and in the second place the latter purpose was perfectly illegal. It is the duty of every person who arrests another on suspicion of felony to take him before a magistrate as soon as he reasonably can; Com. Dig. Imprisonment, *H.* 4; and even a magistrate is not authorized by law, and much less is a constable therefore, to detain a person so arrested, except for a reasonable time, and except for the purpose of his being examined; Com. Dig. Imprisonment, *H.* 5. The magistrate might have been justified in ordering the plaintiff to be detained until *Clarke* could bring forward his evidence, but without his order the defendants could not possibly be justified in detaining him for any such purpose. The defendants have also justified the handcuffing the plaintiff in order to prevent his escape; but they have not averred that it was necessary for that purpose, or that he had attempted

to escape, or that there was any danger of his escaping; and such a degree of violence and restraint upon the person cannot be justified even by a constable, unless he makes it appear that there are good special reasons for his resorting to it. For these reasons the special pleas are clearly insufficient, and the plaintiff is entitled to our judgment.

HOLROYD, J. and LITTLEDALE, J. concurred.

Judgment for the plaintiff.

JAMES *v.* SWIFT.

In a notice of action against a magistrate, under 24 *G.* 2. c. 44, the signature of the plaintiff's attorney need not set out the *christian* name at length; the initial is sufficient.

TRESPASS against a justice of the peace for the county of *Monmouth* for illegally committing plaintiff to prison. At the trial before *Garrow*, B. at the last *Monmouthshire* summer assizes, the notice of action served on the defendant, pursuant to the statute 24 *Geo.* 2. c. 44. appeared to have been signed " *T.* and *W. A. Williams*," the names of the plaintiff's attornies being *Thomas Adams Williams*, and *William Adams Williams*; and it was objected that such a signature did not satisfy the first section of the statute, which required that the name and place of abode of the attorney should be indorsed on the notice. The learned judge, however, was of opinion that the notice was sufficient, and the plaintiff obtained a verdict.

Ludlow now moved for a rule nisi to enter a nonsuit, and renewed the objection. The true names of the plaintiff's attornies have not been indorsed upon this notice, therefore the statute has not been complied with, and the notice is bad. The statute clearly means that all the names of the attorney should be inserted, and initials are not names. But even if the initials of the christian names would suffice, this notice is defective, for not even all the initials are given; it

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ought, at least to have been *T. A.* and *W. A. Williams*, whereas it is only *T.* and *W. A. Williams*.

ABBOTT, C. J.—I think there is no weight in this objection. The word *Adams* may in this case be considered as parcel of the surname, and so be read as connected respectively with the two initials representing the christian names of *Thomas* and *William*. Reading it so, this indorsement is clearly good, for the statute does not in terms require the insertion of the christian name, it uses the word *name*, in the singular number only: and I believe it has been held that the initials of the christian names are sufficient.

BAYLEY, J.—I am of the same opinion. It was decided in *Mayhew* v. *Locke* (*a*) that where notice of action is given to a magistrate under this statute, it is sufficient, in indorsing the attorney's name, to put the initial only of his christian name.

The other judges concurred.

Rule refused.

(*a*) 2 Marsh, 377. 7 Taunt. 63. S. C. and see Tidd, 28. *addend. 6th ed.*

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Where an order of removal was directed to the churchwardens and overseers of the parish of *L.*, and it appeared that *L.* was a vill, and had no churchwardens:—Held, that the defect was mere matter of form, and might be amended by the justices under the 5 *G.* 2. c. 19. s. 1.

Where a pauper served the office of clerk of a chapel in an extra-parochial vill, but resided in an adjoining parish, and performed some of the duties of his office in that part of the parish in which he resided:—Held, that he thereby gained a settlement in the parish.

UPON appeal by the churchwardens and overseers of the poor of the parish of *Llanerchymedd*, in the county of *Anglesea*, against an order of two justices for the removal of *John Owen*, shoemaker, his wife and family, from the parish of

Amlwch in the county of *Anglesea*, to the parish of *Llanerchymedd*, in the same county, the sessions quashed the order, subject to the opinion of this court upon the following case.

In *April*, 1824, overseers were appointed for the parish of *Llanerchymedd*. The order of removal was directed to the churchwardens and overseers of the parish of *Llanerchymedd*. To this it was objected that *Llanerchymedd* was not a parish. The Court of Great Sessions directed the order to be amended in this respect, and the appellants denied their right to do so, which forms the first point in this case. If they had that power the case stands as if the removal had been to the parish or vill of *Llanerchymedd*. The market town or village of *Llanerchymedd* lies partly in the parish of *Amlwch*, the church of which is five or six miles distant, partly in two other parishes, and partly in the *vill* of *Llanerchymedd*, to which place this removal is made. The vill of *Llanerchymedd* lies in the middle of the village, and consists of a small plot of land, the property of the parson, on which stand the whole of the church and churchyard. There are also within it twelve or fifteen houses, and a few acres of land. It has of late maintained its own poor, and the inhabitants have been assessed to the land-tax, as in the hamlet of *Bryngwallen*, which is in the parish of *Ceidio*. No churchwardens were ever known to be appointed, and no evidence was given of the appointment of a constable, although it appeared that the pauper's father had been seen acting as one for several years. The church or chapel of *Llanerchymedd* is kept in repair of right, one side thereof by the family who own the *Llwydiarth* estate, and the other side by the family who own the *Chrodden Issa* estate. That part of the village which is in the parish of *Amlwch* is all on the *Llwydiarth* estate, as are also the hall, and several farms in the vicinity. The chapelry of *Llanerchymedd* is attached to the rectory of *Llanbenlan*, in the presentation of the Bishop of *Bangor*, the parson of which receives the rents of the glebe lands in and near the vill of *Llanerchymedd*,

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appoints the curate, and pays his salary. The emoluments of the curate arise partly from his salary and partly from offerings and oblations, and other payments termed surplice fees. The inhabitants of the vill have no private sitting places in the church; all those on the south side belong to the *Chrodden Issa* estate; those on the north side belong to the *Llwydiarth* estate, which is in the parish of *Amlwch*, and the chief part of the congregation are dwellers on that estate. A proportion of the elements used at the administration of the sacrament at *Llanerchymedd* church is supplied by *Amlwch*. The clerk and sexton of *Llanerchymedd* appear to have been appointed by the *Llwydiarth* family, malgré the minister; his emoluments arise from sweeping the church and washing the surplices, which are not paid by the inhabitants of the vill, and also from offerings and other fees *pertaining to his office*. *John Owen*, the pauper, was appointed clerk and sexton of *Llanerchymedd* in *March*, 1795, and he has executed the office to the present time, dwelling altogether in that part of the village of *Llanerchymedd* which lies in the parish of *Amlwch*. The pauper's father was clearly settled in the vill of *Llanerchymedd*. The respondents insisted that the pauper gained no settlement in *Amlwch* by holding the office of clerk of *Llanerchymedd* as aforesaid, the duties of which they contended were of right only performed in the vill, and no part thereof in *Amlwch*. On the part of the appellants it was insisted that it was the duty of the minister of *Llanerchymedd* to perform domestic service of the liturgy at the houses of those inhabitants of the village and its vicinity who dwelt in the parish of *Amlwch*, and that it was the duty of the clerk to attend him. The respondents called as a witness the Reverend Mr. *Lewis*, who had been curate of *Llanerchymedd* about sixteen years. The appellants called the Reverend Mr. *Richards*, who had been curate since 1798; they also called the pauper, *John Owen*, who had been clerk thirty years, and whose father had been clerk for a great many years before. It appeared from the testimony of all the witnesses, that it had been the

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uniform practice of the minister of *Llanerchymedd*, to attend with his clerk at the houses of the inhabitants of *Amlwch, in the village and its vicinity*, for the purpose of visiting the sick, administering private baptism, and reading a prayer prior to the removal of bodies that were about to be buried at *Llanerchymedd* church. No limits were assigned as to the distance from the village within which these several services had been performed by the minister and clerk of *Llanerchymedd*. No marriages of the inhabitants have been solemnized in *Llanerchymedd*. The witnesses differed in opinion, whether these services rendered to the inhabitants of *Amlwch* by the minister and clerk were rendered as a matter of right or of indulgence. The sessions were of opinion that the pauper had held an annual office, a part of the duties of which were performed *in the parish of Amlwch*, where he resided, and on that ground quashed the order of removal.

Nolan and *Curwood*, in support of the order of sessions. The sessions had no authority to make the amendment in the order of removal, for the 5 *Geo.* 2. c. 19. s. 1. empowers them only to amend defects in form; *Rex* v. *Great Bedwin* (*a*); and this was a defect in substance. The order was directed to the churchwardens and overseers of the parish of *Llanerchymedd*. Now there were no such churchwardens, and overseers have no legal existence as parish officers, except in conjunction with churchwardens. Without the co-operation of the churchwardens, overseers cannot bind out a parish apprentice, *Rex* v. *Fairfax* (*b*); or grant a certificate, *Rex* v. *St. Margaret's Leicester*, (*c*); or constitute a body corporate for any purpose, *Woodcock* v. *Gibson* (*d*): this order, therefore, was directed to parish officers not in existence, and was substantially bad. The words "parish" and "churchwardens" are material and substantial parts of the order, and even if the sessions had authority to

(*a*) 2 Stra. 1158.
(*b*) 3 Mod. 260.
(*c*) 8 East, 332.
(*d*) Ante, 524.

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amend, they could have done it only by erasing the latter word, and substituting the word "vill" for the former. This, however, is a preliminary and subordinate objection; the merits of this case depend upon another point, with respect to which two questions arise: first, whether the pauper exercised a public annual office within any part of the parish of *Amlwch*, and second, if he did, whether having exercised it in part of the parish only, he thereby gained a settlement. Now, as to the second of these questions, the 3 and 4 *W.* 3. c. 11. only requires that the office shall be executed within the parish; and it has been decided that the office need not be executed over the whole extent of the parish, *Rex* v. *Fittleworth* (*a*), *Rex* v. *Liverpool* (*b*). Then, as to the first question, it is quite clear that the pauper exercised his office, which is not denied to be a public annual office, within a part of the parish. The pauper was clerk; it is the duty of the clerk to attend the minister: and the case finds that his emoluments consisted of fees pertaining to his office. [*Bayley*, J. Where was the pauper's dwelling-house? Does it appear that he resided in the same part of the parish over which the duties of his office extended?] That is not expressly stated in the case one way or the other, but these facts are expressly found, that the pauper resided in the parish; that some of the duties of his office were executed in the parish; that the minister also executed some of his functions in the parish, and derived emoluments therefrom; and that the emoluments of both arose out of the same sources: inferentially, therefore, at least, it does appear, that the pauper resided in the same district where he exercised his office. The notoriety of an office is the criterion of its validity to confer a settlement, and it must have been notorious to the inhabitants of *Amlwch* that the office of clerk of *Llanerchymedd* chapel was exercised within their parish; for the clerk was appointed by the owners of an estate in *Amlwch*, and a portion of the sacramental elements used at the chapel was provided by the parish of *Amlwch*.

(*a*) Burr. S. C. 238.   (*b*) 3 T. R. 118.

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Tindal and *Patteson*, contrà. The amendment made in this case was authorized by the 5 *Geo.* 2. c. 119. s. 1, which empowers justices, at sessions, to cause defects in form in orders of removal to be amended; for the defect here was purely formal. The order was directed to the churchwardens and overseers of the parish of *Llanerchymedd*. The fact was that *Llanerchymedd* had no churchwardens, and was a vill and not a parish. Now the churchwardens need not have been mentioned at all, *Regina* v. *Searle* (*a*); and though they are mentioned, it is in the character of overseers, not churchwardens; therefore, upon both those grounds the word "churchwardens" may be rejected as surplusage. *Rex* v. *Great Bedwin* is very distinguishable from this case, for there the order did not state that it was made upon complaint of the churchwardens and overseers, nor that one of the justices was of the quorum, nor that the pauper, who was a certificate-man, was become actually chargeable; all which were clearly defects in substance: but here, the description of *Llanerchymedd* as a parish, is a mere matter of form. Besides, the appellants have appealed against the order by the description of "churchwardens and overseers of the poor of the parish of *Llanerchymedd*," and by so doing they have waived the objection, and are estopped from claiming the benefit of it. Then, upon the merits, the pauper has gained no settlement in *Amlwch*, for, first, he has never exercised the office of clerk, quà clerk, at all, and second, at least he has never exercised it within the parish of *Amlwch*. All the authorities concur in shewing, that in order to gain a settlement by virtue of an office, the pauper must reside in the same place over which the duties of his office extend. *Rex* v. *Liverpool* only decided that if a churchyard lies in two parishes, the sexton may gain a settlement in the one in which he resides, although no part of the church lies within that parish. Here neither the chapel nor chapel-yard are within the parish of *Amlwch*; consequently there is no analogy between the cases. The case,

(*a*) 1 Bott, 3.

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indeed, finds that the pauper performed certain acts within the parish of *Amlwch*, besides the duties connected with the chapel and chapel-yard; but it does not find that he performed them as duties pertaining to his office as clerk: the inference, therefore, is, that they were voluntary acts, and not performed in the discharge of his duties as clerk. If that be so, the sessions have not decided the question whether the office of clerk was of right exerciseable within the parish of *Amlwch*, and as the evidence tends to shew that it was not, the Court must adopt that conclusion, and say that no settlement has been gained. But, at all events, the office has been exercised within a part only of the parish, and upon that ground it is insufficient to confer a settlement. There are many cases in which it has been held, that an office, the duties of which extend over several parishes, will confer a settlement; *Rex* v. *St. Lawrence, Reading* (*a*), and *St. Maurice* v. *St. Mary Kalendar* (*b*): but in every one of those it will be found that the duties of the office extended over the whole of that particular parish in which the pauper resided. It is admitted, that notoriety is the ground upon which the serving an office confers a settlement; but that notoriety must not be partial; it must extend over the whole parish; *Rex* v. *Holy Cross, Westgate* (*c*); which it is quite impossible it should do, where the duties of the office are exercised over a very small part of the parish, as in the present case.

Bayley, J. (*d*)—I am of opinion, upon the fair and reasonable construction of the statute 5 *Geo.* 2. c. 19, that the sessions had authority to amend the order of removal in this case in the manner they did. The first section of that statute enacts, "that upon all appeals made to the justices at sessions against judgments and orders made by any justices, such justices so assembled at sessions, shall, upon all appeals so made to them, cause any defects of form that

(*a*) 2 Bott, 156.
(*b*) Burr. S. C. 27.
(*c*) 4 B. & A. 619.
(*d*) *Abbott*, C. J. was absent.

shall be found in any such original judgments or orders to be rectified and amended." The order of removal in this case was directed to the churchwardens and overseers of the parish of *Llanerchymedd*. In point of fact there were no churchwardens of *Llanerchymedd*, and it was not a parish, but a vill. That the order reached the parties for whom it was intended is clear, because they appealed against it, and by the same description which it gave them; but when the appeal came on they contended that *Llanerchymedd* was not a parish, but an extra-parochial vill; that is, they pleaded a misnomer. Now that was a mere matter of form; therefore the case of *Rex* v. *Great Bedwin* is very different, because there the order did not state the complaint of the churchwardens and overseers, nor that the pauper had become actually chargeable; both which were defects in substance; because, without the complaint of the churchwardens and overseers, the justices had no power to remove, and until the pauper, who was certificated, had become actually chargeable, he was not liable to be removed. The other and material question in this case is, whether the pauper exercised a public annual office within the parish of *Amlwch*, within the meaning of the statute 3 & 4 *W.* 3. c. 11. The sixth section of that statute enacts, "that if any person shall execute any public annual office in the parish during one whole year, then he shall be adjudged to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereby before required." The legislature, therefore, clearly intended the executing an office in the parish to be so notorious as to form an equivalent to the notice which they had made requisite in other cases. The question here is, whether the pauper acquired a settlement by executing the office of clerk and sexton in part of the parish in which he resided. Now, it is not necessary, in order to acquire a settlement by serving an office, that the duties of the office should be co-extensive with the parish. If it be notorious to the parish that the office is of right exerciseable within it, that

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is enough. In *Rex* v. *St. Mary, Reading*, which was the case of a constable, and in *St. Maurice* v. *St. Mary, Kalendar*, which was the case of a tythingman, the duties of the office extended over several parishes besides those in which the paupers resided; yet it was held in both those cases that a settlement was gained. In *Rex* v. *Fittleworth* a certificate-man was elected and sworn a tythingman, for a tything which did not extend through all the parish of *Fittleworth*, but comprehended that part of it where he resided; and the Court said it was not necessary that the office should extend throughout all the parish; the act only required executing some annual office in the parish. Then, were the duties of the office of clerk and sexton of the vill and chapelry of *Llanerchymedd*, or some of them, notoriously and of right exerciseable within the parish of *Amlwch*? Whether the vill and the chapelry are, in point of fact, co-extensive, does not appear; they are not necessarily so; for *Llanerchymedd* being an extra-parochial place, the duties of the office of clerk and sexton of the chapelry may be confined and limited to the vill. The founder of a chapel may, by consent of the rector, fix the limits of the chapelry; and it was matter of evidence, therefore, in the present case, whether the chapelry did or did not extend beyond the vill. The evidence adduced upon the point at sessions was contradictory; but looking at it altogether, it seems to me that the justices have arrived at the right conclusion, namely, that the duties of the office were notoriously and of right performed within the parish of *Amlwch*; and if that be so the pauper has acquired a settlement in that parish. The rector of *Llanbenlan*, to which *Llanerchymedd* is attached, appoints the curate, and pays his salary. The owner of the *Llwydiarth* estate appoints the clerk and repairs the chapel. The chapel is appropriated, part to the use of the tenants of the *Llwydiarth* estate, and part to the use of the tenants of another estate. The inhabitants of the vill have no sitting-places in the chapel. It has been the uniform practice of the minister of *Llanerchymedd* occasionally to

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attend with his clerk at the houses of the inhabitants of *Amlwch;* whether as matter of duty or of indulgence was left in doubt: but in my opinion the sessions have done right in concluding that it was done as matter of duty. Then, was the exercise of this office notorious in the parish of *Amlwch?* I think it is impossible to doubt that it was; the fact of the parish having supplied a portion of the sacramental elements is decisive to shew its notoriety there, because part of the charges made by the parish officers of *Amlwch*, in their accounts, must have been for bread and wine supplied to the chapel of *Llanerchymedd;* and that fact goes far to prove that the chapel was erected for the benefit of the parish as well as of the vill. Upon the whole, therefore, I am of opinion that the order of sessions was right, and ought to be affirmed.

HOLROYD, J. and LITTLEDALE, J. concurred.

Order of sessions affirmed.

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A mere right of common is not rateable.

Where certain persons, as burgesses of a town, and occupiers of ancient messuages within it, had a right to turn cattle upon certain lands, at certain periods of the year, to the exclusion of the owners of the soil:—Held, that they had a mere right of common, in respect of which they were not rateable to the poor.

APPEAL against a poor-rate for the town and county of the town of *Nottingham.* The appellants contended, first, that they were improperly rated in respect of land of which they were not the occupiers; and, second, that other persons who were the occupiers of land were not rated. The sessions amended the rate by striking out the names of the appellants in respect of the land for which they were rated, and confirmed the rate as to all the other persons rated, subject to the opinion of this Court upon the following case:

The town and county of the town of *Nottingham* comprises three parishes, *St. Mary, St. Peter,* and *St. Nicholas.* In the parish of *St. Mary* there are large fields or tracts of

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land, called the *Sand Field*, the *Clay Field*, and the *Meadows*, belonging to different persons. The land called the *Meadows* consists of about 280 acres, to the pasturage and herbage of which the burgesses resident in the three parishes, even if they are inmates not renting or holding any tenement or hereditament whatever, are exclusively entitled, and to turn in three head of large cattle each from *Old Midsummer Day* to *Old Lammas Day*, when all the cattle are taken out, and the pasturage is laid till the 3d of *October*, when the burgesses are again exclusively entitled to turn in a like number of cattle until the 2d of *February* following, which pasturage and herbage is of the value of 10s. per acre between *Old Midsummer* and *Candlemâs*. The quantity of land in the *Sand Field* and *Clay Field* comprises about 650 acres, fenced off into different sized closes, belonging to different individuals. The burgesses resident in the three parishes, and also the occupiers of ancient messuages in the three parishes, and who, as such occupiers, are severally rated to the poor in their respective parishes in respect of their messuages and other property, but not for such common right, claim, and such of them as chuse, exercise, the right to turn in three head of large cattle from *Old Lammas Day* to *Old Martinmas Day* in every year, during which period neither the owner of the freehold nor the tenants have, as such, any right to turn in cattle therein; and during that period the pasturage and herbage of the *Fields* is also of the value of 10s. per acre. The several persons named in the notice of appeal, and who have been duly served with the same, had each of them cattle, some three, some two, and some one, in either the *Fields* or *Meadows*, during some part of the time the same were commonable, and at the time of making the rate; but none of such several persons were included in the rate for so depasturing their cattle, nor has it ever been usual in the parish of *St. Mary* to rate the persons turning cattle into the *Fields* and *Meadows* during the time of their so being open; and the court of sessions refused to quash or amend the rate, on

account of such burgesses and occupiers of ancient messuages being omitted to be rated, from the impossibility of ascertaining and rating the whole of such persons so turning cattle into the *Fields* and *Meadows*, for their actual occupation and enjoyment, there being upwards of two thousand burgesses entitled so to turn in cattle, besides the occupiers of many hundred messuages, many of whom exercise such rights in different modes and at different times, as by turning in one or more head of cattle for a night, or a day, and in other ways, and there being no coin small enough to assess some of them, if they were liable to be rated only for their actual occupation and enjoyment.

Scarlett and *S. M. Phillipps*, in support of the order of sessions. There are three answers to this appeal. First, the sessions having amended the rate by striking out the names of these appellants, they are no longer persons aggrieved by the rate, and have no longer any ground or right of appeal. Second, the case does not state, and the fact cannot be presumed, that these appellants are burgesses, and then non constat that they ever had any ground or right of appeal. Third, the persons whose names the sessions refused to insert in the rate are not rateable. The case describes them as persons, about two thousand in number, being burgesses and occupiers of ancient messuages, and having an exclusive right of pasturage for a limited number of cattle, in three parcels of land, for a limited portion of the year. They have, therefore, nothing more than a right of common. They have no such interest in the land as can be the subject of rate. They are neither the owners nor occupiers of the land; they could not maintain an action of trespass in respect of it even against a wrong-doer. They are merely in the exercise of a right of common, and for that they are not liable to be rated: *Rex* v. *Tewkesbury* (*a*), *Rex* v. *Aberavon* (*b*). If the land were vested in the corporation

(*a*) 13 East, 155. (*b*) 5 East, 460.

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as trustees for the burgesses, it would be the subject of rate; but then the rate would be payable by the corporation, and not by the burgesses: *Rex* v. *Sudbury* (*a*).

Nolan and *Balguy*, contrà. The two preliminary objections require no answer; they have no weight whatever. The third objection is more important: upon that the whole merits of the case depend. The rate is clearly defective in omitting the names of the other burgesses. They exercise and enjoy the exclusive right to the pasturage and herbage of the land; they are, therefore, the occupiers of it: if they are not, there are no occupiers at all, and the land must go unrated. They have something more than a mere right of common; they have the exclusive occupation. None of the cases cited support the argument on the other side, because in every one of those the corporation were held to be the occupiers; whereas, here there is no occupation if not in the burgesses, and they are certainly the occupiers of something, beneficially to themselves, and exclusively as against others. What their title is, or how derived, is not now matter of inquiry; the facts stated in the case shew them to be occupiers, and as such they are rateable. *Rex* v. *Watson* (*b*) seems a direct authority in favour of these appellants. There a corporation were seised in fee of lands, which by custom were annually measured out, under their control, by a leet jury, according to a certain stint, to such of the resident burgesses as chose to stock them; and it was held, that the burgesses who so stocked the lands were liable to be rated as the occupiers of them. *Bayley*, J. in his judgment in *Rex* v. *Sudbury*, says, "the case of *Rex* v. *Watson* differs from the present in two particulars; first, it was considered in that case, that the individual who turned on, had the exclusive occupation and enjoyment, independently of any right whatever in the corporation; and, second, nothing was paid to the corporation by those who stocked."

(*a*) Ante, vol. ii. 651. (*b*) 5 East, 481.

Now this case differs also from *Rex* v. *Sudbury* in both those particulars; the one, therefore, is no authority to govern the other.

Bayley, J. (*a*).—It is unnecessary to decide the first two questions raised in this case, because my opinion is clearly in favour of the order of sessions upon the third question, which involves the whole merits of the case. In order to render a party liable to poor-rates, he must be shewn to be an inhabitant, or an occupier of lands, houses, &c. within the parish. The question here is, whether the parties whose names it is alleged have been improperly omitted in the rate, were, or were not, individually, occupiers of land. "Common" is a term well known to the law. Lord *Coke* says (*b*), "There be four kinds of common of pasture; common appendant, which is of common right, (and therefore a man need not prescribe for it,) and is appendant to arable land; common appurtenant, for which one must prescribe; common per cause de vicinage, which is but an excuse for trespass; and common in gross, which is so called, for that it appertaineth to no land, and must be by writing or prescription." The right to land is corporeal; a right of common is incorporeal: land lies in livery; a right of common in grant. Does the right, in respect of which it is attempted to rate the burgesses of *Nottingham*, lie in livery or in grant? It clearly does not lie in livery: it could not pass by livery. They claim it as burgesses, and as occupiers of ancient messuages. How could such a privilege be conveyed to them? Could they be enfeoffed of it? Clearly not. Then it follows that they have no interest in the soil, but merely an incorporeal hereditament, a right of common by prescription, which is not rateable. For these reasons I am of opinion that the order of sessions was right.

Holroyd, J.—I am of the same opinion. I think the burgesses are not rateable in respect of their right of com-

(*a*) *Abbott*, C. J. was absent. (*b*) Co. Litt. 122 *a*.

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mon upon the land in question. That right, as it seems to me, is not vested in the burgesses, but in the corporation, for the benefit of the burgesses. It is settled, that where an interest, or profit à prendre, is to be claimed out of another man's soil, it must be alleged by way of prescription, and not by custom; except in the case of a copyhold tenant against his lord: *Foiston* v. *Crachroode* (*a*), *Mellor* v. *Spateman* (*b*). Now, the latter of those cases shews that the burgesses in this case cannot take as a corporation, and cannot prescribe for the right in themselves: so that if there was any such legal possession of the land as would maintain an action of trespass, it must be by the corporation, and not by the burgesses; for a commoner cannot maintain trespass for damage to the soil or grass, for he has no interest but to take the pasture by the mouths of his cattle: *Com.* Dig. Common, (H.). This is a mere incorporeal right, and not within the statute 43 *Eliz.* c. 2; it is a mere right of common, and not rateable per se, though the land to which it is attached may, for that reason, be rated at a higher value.

LITTLEDALE, J.—I am also clearly of opinion that these burgesses are not liable to be rated as individuals. They have no interest in the land; they have a mere right of common; and that, according to decided cases, is not the subject of rate. The exclusive pasturage did not give them the exclusive occupation, and they had no such interest as would entitle them to maintain trespass. The right which they enjoyed they could claim only by prescription, in the name of the corporation. A man may prescribe for the sole, or the several pasture, to the exclusion of the owner of the soil; *Co. Litt.* 122, a. (l.); *Com.* Dig. Prescription, (H.); *Hoskins* v. *Robins* (*c*); and in such cases, he who enjoys the right has power to grant it to another. But here the burgesses had no power to grant to others; for the exclusive right was not in them, but in the corporation, for their benefit; and even the corporation had it for certain parts of

(*a*) 4 Rep. 31 *b*. (*b*) 1 Saund. 341. n. (3.) (*c*) 2 Saund. 324

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the year only, and could take it only by grant or by prescription. The burgesses could not take it themselves, either by grant or by prescription; consequently, they could have no more than a mere right of common; and in respect of that they are not rateable. I agree, therefore, that the order of sessions ought to be affirmed.

Order of sessions affirmed.

END OF TRINITY TERM.

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2. Where the memorial of an annuity deed described one of the subscribing witnesses as "*G. M. Dance*, of *Cursitor Street*, in the county of *Middlesex*, attorney at law," without setting out his christian names at full length, in compliance with the 53 *G.* 3. c. 141. s. 2. :—Held, a fatal objection in ejectment for the premises on which the annuity was secured. *Doe* v. *Bromley*, *E.* 6 *G.* 4. 292

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1. Where a defendant, on being taken in execution under a writ of ca. sa., tendered the debt and costs to the plaintiff's attorney, and required him to sign his discharge, which he refused to do, until he had paid an independent collateral demand for costs:—Held, that the plaintiff and his attorney were liable to an action on the case for such refusal. *Crozer* v. *Pilling*, *E.* 6 *G.* 4. 129

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3. An agent for a plaintiff's attorney, dying intestate and insolvent, pending a suit, has a lien for his costs upon a postea, of which the former has obtained possession after the death of the intestate. *Taunton* v. *Goforth*, *T.* 6 *G.* 4. 384

4. Death of a principal attorney, pending a suit, does not revoke his agent's authority to obtain possession of a postea, after verdict found for the former. *Id.* *ib.*

5. A person who holds a situation, and receives a salary from government, as surveyor of assessed taxes, is not sui juris to enter into a contract for service as an articled clerk to an attorney: and where a person so situated was articled to an attorney, and nominally served him for five years, retaining his situation under government all the time, and then commenced practising as an attorney, the Court ordered him to be struck off the roll. *In re Taylor*, *T.* 6 *G.* 4. *page* 428

6. An agent appointed to practise in the Insolvent Debtors' Court, if he be an attorney of any of the superior courts of record, cannot recover his bill of costs for business done in procuring the discharge of an insolvent debtor, without delivering his bill one month before action brought, pursuant to the provisions of 2 *G.* 2. c. 23. s. 23. *Smith* v. *Wattleworth*, *T.* 6 *G.* 4. 510

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A banker's check, dated the 16th, for 50*l.*, payable to *A.* or bearer, was changed, on the 22d *November*, by a tradesman, for a strange woman, who purchased some goods at his shop, and next day he received cash for it at the banker's. On the 25th, *A.*, the payee, gave notice to the banker to stop payment of the check:—Held, in an action by *A.* against the tradesman for money had and received to his use, first, that it was not incumbent on the plaintiff to shew how the check got out of his possession; and second, that if the jury were satisfied that the defendant had taken the check (which was overdue five days) under such circumstances as ought to excite the suspicion of a prudent man, even though he gave valuable consideration for it, and acted bonâ fide, the true owner had a right to recover the amount; for a banker's check, overdue, stands on the same footing as a bill or note put into circulation after its date has expired, and the holder must shew title in his immediate payer before he can retain the proceeds. *Down* v. *Halling*. *T.* 6 *G.* 4. *page* 455

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1. The holder of bills of exchange, accepted payable at a banking-house, neglected to present them when due, and the bankers, in whose hands the acceptor had funds, having afterwards failed:—Held, that the acceptor was still liable, there being no obligation on the part of the holder to present them at the banking-house or to the acceptor at the time they became due. *Turner* v. *Hayden*, *E.* 6 *G.* 4. 5

2. The acceptor of an accommodation bill having delivered it to *A.* for a special purpose, and the latter, without performing his trust, having quitted the country after committing an act of bankruptcy, was pursued by a creditor, who obtained the bill from him in ignorance of his bankruptcy and of the circumstances under which the bill was accepted:—Held, that the acceptor was not liable upon the bill at the suit of the creditor who had so possessed himself of it. *Smith* v. *De Witts*, *E.* 6 *G.* 4. 120

3. In an action by the indorsee against the indorser of a bill of exchange, alleged in the declaration to have been *accepted* by *A. B.*, the plaintiff is not bound to prove the acceptance in order to entitle him to recover. *Tanner* v. *Bean*, *T.* 6 *G.* 4. 338

4. Notice, to the drawer, of the dishonour of a bill of exchange, must contain a statement that the bill

has been in fact presented and dishonoured; otherwise it is insufficient. *Quære*, whether notice to drawer, on the same day the bill has been once presented and dishonoured, is premature. *Hartley* v. *Case*, *T.* 6 *G.* 4. *page* 505

5. The drawer of a bill absconded, and was made a bankrupt before the bill was due. His house continued open, and in the possession of the messenger under the commission after the bill was due. The holder knew of the appointment of *A.* and *B.* as the drawer's assignees, before the bill was due. The acceptor became bankrupt before the bill was due. The holder neither gave, nor made any attempt to give notice, either to the drawer or his assignees:—Held, that he was guilty of laches; that his claim against the drawer was barred; and, consequently, that he had no right to prove the bills under his, the drawer's commission. *Rohde* v. *Proctor*, *T.* 6 *G.* 4. 610

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If a person, *bonâ fide* intending to pursue the authority given by the Building Act, 14 *G.* 3. c. 78, erects a party-wall without in fact pursuing the directions of the statute, and thereby injures his neighbour's house, he is liable to an action, but the action must be brought after twenty-one days' notice, and within three months after the injury done. *Pratt* v. *Hillman*, *T.* 6 *G.* 4. 360

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1. Section 80 of the General Highway Act, 13 *G.* 3. c. 78., which takes away the certiorari, does not extend to cases where the justices at sessions act wholly without jurisdiction. Therefore, where the justices at petty sessions made an order for the allowance of the accounts of a surveyor of highways, which accounts had not been previously verified before one justice, pursuant to the requisites of section 48 of the act:—Held, that they acted wholly without jurisdiction; that their order was not a proceeding had pursuant to the act; and, consequently, that certiorari lay to remove it into this Court, for the purpose of having it quashed. *Rex* v. *Somersetshire. T.* 6 *G.* 4. 469

This Court will not grant a certiorari to remove proceedings in quare impedit from the court of great sessions at *Chester* into this Court, where a special verdict is expected to be found; the proper course is to remove the special verdict, when found, into this Court, by writ of error. *Pickering* v. *Bishop of Chester*, *T.* 6 *G.* 4. 489

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Where, by custom or charter, a particular day is fixed for the election of the burgesses of a corporation, it is the duty of the burgesses to take notice that the election will take place on such particular day, and attend to exercise their elective franchises if they be so minded; but where no specific day is fixed by custom or charter, and the business of electing burgesses as well as other business may be done on many days in the year, notice must be given to the resident burgesses, of a corporate meeting for such purpose, and in such reasonable time as to give them all an opportunity of attending and voting at the election: notice, therefore, by ringing a bell fixed at the top of the guildhall of a corporation, the liberties of which extend three miles, and in which there is an indefinite number of burgesses, is not a sufficient notice of a corporate meeting for the election of burgesses, nor can either a custom or bye-law render such a notice binding, unless it appear that all the burgesses have attended *for the purpose* of electing burgesses. *Rex* v. *Hill, T.* 6 *G.* 4. *page* 593

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1. The copy of a newspaper delivered at the stamp-office under the provisions of the 38 *G*. 3. c. 78., is conclusive evidence of publication to sustain an indictment against the proprietor for a libel contained in such copy. *Rex* v. *Amphlitt*, *E*. 6 *G*. 4. *page* 125
2. On the trial of a civil cause an examined copy of an answer in chancery is admissible in evidence, to contradict a witness, who swore in opposition to what was stated in the answer, to which he was a party. *Ewer* v. *Ambrose*, *E*. 6 *G*. 4. 127
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5. An order directed by the Insolvent Debtors' Court to a gaoler, to discharge a debtor from his custody, is sufficient evidence of the prisoner having been discharged under the 53 *G*. 3. c. 102., without producing the judgment of the court, or a certified copy thereof. *Neale* v. *Isaacs*, *T*. 6 *G*. 4. 464
6. Declaration, for an escape, stated that the debtor was arrested, and gave bail; that bail above was put in *before a judge at chambers*, *prout patet per recordum*; and that the debtor surrendered in discharge of her bail, and afterwards escaped. The examined copy of the entry of the recognizance of bail stated it to have been taken *before the Court at Westminster*: — Held, first, that plaintiff was bound to prove the bail to have been taken as alleged, and, therefore, that the variance was fatal; and second, that an entry in the filacer's book, stating the recognizance to have been taken *before a single judge*, was not admissible in evidence, and would not

cure the objection, even if admitted. *Bevan* v. *Jones, T.* 6 *G.* 4. *page* 483

7. In an action against the marshal for an escape, averring the judgment and award of execution against the prisoner for the damages recovered against him; "and *thereupon,*" on such a day, the prisoner was committed to the custody of the marshal, and escaped; it is unnecessary to prove that a scire facias had been sued out upon the judgment, the allegation being immaterial. *Bromfield* v. *Jones, T.* 6 *G.* 4. 500

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A. held an office in the gift of *B.*, and agreed with *C.* to resign, and procure him to be appointed in his stead; in consideration of which *C.* agreed to give *A.* half the profits, and executed a deed to that effect. *A.* resigned, and *B.* at his request, but in ignorance of the agreement, appointed *C.* to the office. *A.* brought covenant against *C.* for half the profits:—Held, that the agreement was a fraud upon *B.*, and consequently illegal and void. *Walldo* v. *Martin, T.* 6 *G.* 4. *page* 364

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See Pleading, 2.

A., being lord of the manors of *B.* and *C.*, by lease and release of 1773, bargained and sold to *D.* "all that messuage, tenement or boat-house, &c. and also all that and those sea-grounds, oyster-layings, shores and fisheries, commonly called and known by the names of *B.* and *C.* shores or sea-grounds, with full and free liberty to *D.* and his heirs and assigns for ever to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same, which said sea-grounds, oyster-layings, shores and fisheries, extend from the south at low water mark, to the north at high water mark, and abut towards the east and the west upon certain other sea-grounds, and all which said sea-

grounds, oyster-layings, shores and fisheries, hereby granted, conveyed, &c. contain, in the whole, by estimation, 800 acres of land covered with water, or thereabouts, as the same are beaconed, marked, and stubbed out: saving to the grantor, his heirs and assigns, lords of the said manors, all fish-royal, and all wrecks of the sea, flotsam, jetsam, and ligan, within the said manors, and all other manorial rights; to hold the messuage, tenement or boat-house, sea-grounds, oyster-layings, shores, fisheries, hereditaments, and premises, with the appurtenances, of the grantor, lord of the said manors, by such suit of court, and other services, as were of right and ought to be done and performed by other the freehold tenants of the said manors respectively, seised of estates of inheritance in fee simple." Since the date of the deed the sea had imperceptibly incroached upon the land, and the high and low water marks had varied in the same proportion:—Held, that so much of the soil of the shore as *from time to time* lay between high and low water mark, had passed to the grantee under this deed. *Scratton* v. *Brown*. *T.* 6 *G.* 4. *page* 536

GRANTOR AND GRANTEE.

See GRANT.

HABEAS CORPUS.

A prisoner in custody of an officer of customs, on a charge of smuggling, and brought up by habeas corpus at common law, may controvert the truth of the return to the writ, on affidavit, by virtue of 56 *G.* 3. c. 100. s. 4. *Ex parte Beeching*, *E.* 6 *G.* 4. 209

HABEAS CORPUS CUM CAUSA.

Habeas corpus cum causâ does not lie to remove proceedings from an inferior court into this Court, unless it appears that the defendant is actually or virtually in custody. *Palmer* v. *Forsythe*, *T.* 6 *G.* 4. *page* 497

HIGHWAYS.

See BRIDGES.—CERTIORARI, 1.—NAVIGATION, 3.—SESSIONS, 3.—TURNPIKE, 1.

1. The General Highway Act, 13 *G.* 3. c. 78. ss. 6. & 63, does not authorize the surveyor to widen a road to thirty feet, by removing a fence, unless the fence, supposed to be an encroachment, is actually *upon* the highway. *Lowen* v. *Kaye*, *E.* 6 *G.* 4. 20
2. Where a public footway over crown land is extinguished by an inclosure act, but the public continue for twenty years afterwards to use the way, such user is not evidence of a dedication of the way to the public, unless it appear to have had the consent of the crown. *Harper* v. *Charlesworth*, *T.* 6 *G.* 4. 572

HUNDRED.

1. An affidavit by the owner of premises wilfully set on fire, "that he does not know the person or persons who wilfully set fire to his premises;" but not adding, *or any of them;* does not satisfy the 9 *G.* 1. c. 22. s. 8, and will not support an action against the hundred for compensation. *Trimmer* v. *The Hundred of Mutford*, *E.* 6 *G.* 4. 10
2. The 9 *G.* 1. c. 22. s. 8, requires that *all* the servants having the care of property wilfully destroyed by fire, shall be examined before a magistrate, before the owner can sue the hundred for damages. *Duke of Somerset* v. *Mere*, *E.* 6 *G.* 4. 247
3. Where, in an action on this statute (9 *G.* 1. c. 22.) by the owner of

property wilfully destroyed by fire, against the hundred, it appeared that the plaintiff's steward, who lived a mile and a quarter from the property, had the general superintendence of it, and several labourers, employed under him, worked on the spot, and had the actual care of it, but the steward only was examined before the magistrate:—Held, that the requisites of the statute were not complied with, and the action was not maintainable. *Duke of Somerset* v. *Mere*, *E.* 6 *G.* 4. *page* 247

4. *Quære.* Whether a steward is a servant, within the meaning of this act (9 *G.* 1. c. 22.). *Id.* *ibid.*

INCLOSURE ACT.

See Highways, 2.—Tithes.

INDICTMENT.

See Conspiracy.—Costs, 2.—Evidence, 1.—New Trial.—Practice, 8.

Indictment for a conspiracy to extort money. One count averred that defendants, in pursuance of a conspiracy to extort money from the prosecutor, *falsely* exhibited certain indictments against him; another count averred that defendants, in pursuance of the like conspiracy, offered to suppress an indictment pending against the prosecutor if he would give them money for so doing. The jury found the defendants guilty, generally, but found, specially, that the indictments preferred by them against the prosecutor were *not false*:—Held, that the averment in the former count was immaterial, and that the latter count would support the conviction. *Rex* v *Hollingberry*, *T.* 6 *G.* 4. 345

INFERIOR COURT.

See Attorney, 6.—Certiorari.—Habeas Corpus cum Causa.—Practice, 5.

INFORMATIONS BEFORE JUSTICES.

See Conviction.—Penalties.

Informations before magistrates must be taken as nearly as possible in the language used by the party. *Cohen* v. *Morgan*, *E.* 6 *G.* 4. *page* 8

INSOLVENT DEBTOR.

See Attorney, 6.—Evidence, 5.

1. The Insolvent Debtors' Act, 1 *G.* 4. c. 119., is to receive a liberal construction in favour of the prisoner, and a discharge under the same is a bar to the claims of creditors, provided, under s. 6, the insolvent describes in his schedule those persons to whom, according to the best of his knowledge or belief, he is primarily liable. Therefore, where an insolvent contracted for goods with *A.*, who was only the agent for a company, and after giving two promissory notes for the debt, amounting to 82*l.* 8*s.* 6*d.*, became insolvent, and took the benefit of the act, without describing the company as his creditors, and stating the debt to be only 82*l.*:—Held, that his discharge was an answer to an action at the suit of the latter upon the promissory notes. *Forman* v. *Drew*, *E.* 6 *G.* 4. 75

2. An insolvent debtor may maintain an action for goods sold by him after the hearing of his petition in the Insolvent Debtors' Court, and while he was in custody under their order; but the balance of a debt inadequately described by him in his schedule, may be set off in such an action, for the discharge relieves

after the tenancy has expired, may distrain under 8 *Ann.* c. 14. ss. 6. and 7. on that part, within six months after the expiration of the tenancy. *Nuttall* v. *Staunton, E.* 6 *G.* 4. *page* 155

LEASE.

See COVENANT.—GRANT.

Where a lease was dated 25th *March*, 1783, habendum "from the 25th *March, now last past*," and it was proved that the deed was not executed until some time after the date:—Held, that the term commenced on the 25th *March*, 1783, and not on the 25th *March*, 1782. *Steele* v. *Mart, T.* 6 *G.* 4. 392

LESSOR AND LESSEE.

See COVENANT.—GRANT.—LEASE.

LIBEL.

See COUNSEL. — EVIDENCE. 1. — MALICE.—PLEADING, 7.

LIEN.

See ATTORNEY, 3.

LIMITATION OF ACTIONS.

See BUILDING ACT.—TURNPIKE, 2.

LIMITATIONS, STATUTE OF.

See PLEADING, 2.

MALICE.

See ATTORNEY, 1.—MALICIOUS ARREST.

Where, in an action for slandering plaintiffs in their business of bankers, it was proved that *W.* said to defendant, "I hear that you say that the plaintiffs' bank at *M.* has stopped; is it true?" and defendant answered, "Yes, it is. I was told so. It was so reported at *C.*, and nobody would take their bills, and I came to town in consequence of it myself:"—Held, that as in actions of slander there are two sorts of malice, one in law, and the other in fact, it ought to have been left to the jury to say, first, whether defendant understood *W.* as asking for information, and whether he had uttered the words merely by way of honest advice to regulate *W*'s. conduct; and, if they were of that opinion, secondly, whether in so doing, he was guilty of any malice in fact. *Bromage* v. *Prosser, E.* 6 *G.* 4. *page* 296

MALICIOUS ARREST.

1. Where a person having lost a bill of exchange, which he supposes to have been stolen, goes before a magistrate, and relates the circumstance of the loss, and the magistrate grants his warrant to apprehend *A. B.* on a charge of having "feloniously stolen, taken and carried away" the bill of exchange, (language which the complainant did not use when he laid his information), and upon subsequent investigation of the case it turned out to be no felony:—Held, that case would not lie for maliciously procuring the magistrate to grant his warrant. To sustain the averment of malice, the charge must be *wilfully false*. *Cohen* v. *Morgan, E.* 6 *G.* 4. 8
2. *A.* arrested *B.* for money paid to his use on the 10th of *December*; was ruled to declare on the 17th; filed a declaration on the 24th; and discontinued the action, upon payment of costs, on the 31st:—Held, in case for a malicious arrest, that this was sufficient primâ facie evidence of malice and want of probable cause. *Nicholson* v. *Coghill, E.* 6 *G.* 4. 12

MANDAMUS.

See Church Rate. — Custom. — Parish Election.

1. The Court will not grant a mandamus to the mayor of a corporation to hold a court-leet for the purpose of administering the oath of allegiance to an inhabitant desirous of taking it. *Rex* v. *Maidstone, T.* 6 *G.* 4. *page* 334
2. Mandamus does not lie to allow the inspection of the records of a court-leet, unless the party assigns some satisfactory reason for the inspection. *Id.* *ib.*

MAYOR.

See Mandamus, 1.

MILITARY OFFICER.

A colonel in a regiment on full pay was appointed civil superintendent of a colony, and to "command such of his Majesty's subjects as are now armed, or may hereafter arm, for the defence of the settlers." After acting both as military commander and civil superintendent for some years, his regiment was disbanded, and he was reduced to half pay; but he was still recognized in both capacities by the authorities at home, and in the colony:—Held, that his appointment to command all persons armed for the defence of the colony, gave him a right to command all the King's troops there, and, that he did not lose that right by the disbandment of his regiment, and his reduction to half pay. *Bradley* v. *Arthur, T.* 6 *G.* 4. 413

MUTINY ACT.

See Military Officer.

NAVIGATION.

1. A river or creek, into which the tide flows, is not, therefore, necessarily a public navigation. *Rex* v. *Montague, T.* 6 *G.* 4. *page* 616
2. A public right of navigation on such a river or creek, may be extinguished either by legal means, as an act of parliament, a writ of ad quod damnum, or an order of commissioners of sewers; or by natural causes, as the retreat of the sea, or a deposit of silt and mud. *Id.* *ib.*
3. Where a public road, obstructing a creek once navigable, has existed beyond living memory, the law will presume that the public right of navigation has been destroyed by some one of the means above mentioned. *Id.* *ib.*

NEGLIGENCE.

See Case.—Pleading, 5.—Vendor and Purchaser.

NEW TRIAL.

See Practice, 6. 8.

Where, upon the trial of an indictment for a misdemeanour, a witness examined before the grand jury was not examined at the trial, and a witness not examined before the grand jury was examined at the trial:—Held, that this was not such a surprize upon the defendants as entitled them to a new trial. *Rex* v. *Hollingberry, T.* 6 *G.* 4. 345

NISI PRIUS.

It is discretionary with a judge at nisi prius, whether he will or will not try an idle or frivolous cause, and if he suffers it to be tried, and the plaintiff recovers a legal verdict, it is no ground for disturbing the verdict. *Robinson* v. *Mearns, E.* 6 *G.* 4.

NONSUIT.

See Costs, 3. —— Nisi Prius. — Pleading, 2.—Treble Costs.

NOTICE.

See Corporate Meeting.

NOTICE OF ACTION.

See Building Act.—Justices, 2.—Turnpike, 2.

NOTICE OF APPEAL.

See Sessions, 2, 3.

NOTICE OF TRIAL.

See Sessions, 2.

NUDUM PACTUM.

See Agreement.

OATH OF ALLEGIANCE.

See Mandamus, 1.

ORDER OF JUSTICES.

See Justices.

OVERSEERS.

See Churchwardens and Overseers.

OVERSEERS' ACCOUNTS.

See Sessions, 1.

PARISH ELECTION.

See Church Rate.—Custom.

An election, *by ballot,* of a curate of a parish, by the parishioners, is illegal and void. *Faulkner* v. *Elger, T.* 6 *G.* 4. *page* 517

PARTY-WALLS.

See Building Act.—Treble Costs.

PENALTIES.

See Award.

The penalties imposed by the 33d section of the Coal Act, 47 *G.* 3. s. 2. c. 68, cannot be recovered upon information before a magistrate; the jurisdiction of the magistrates being confined to cases where the penalty may be reduced below 20*l.* *Thompson* v. *Poole, E.* 6 *G.* 4. *page* 29

PLEADING.

See Bill of Exchange, 3.—Case.—Conspiracy.—Corporate Meeting.—Costs, 1.—Evidence, 6, 7, 8.—Indictment.—Landlord and Tenant.—Malicious Arrest, 1.—Practice, 4. 7.—Quo Warranto, 3, 4.—Turnpike, 2.—Variance.—Warranty.

1. Covenant, by one of five tenants in common, on a lease for rent payable on the four most usual days of payment in the year. Breach, that on the 24th *June,* a large sum of money, to wit, the sum of 21*l.* 15*s.*, one fifth part of the rent, for three quarters of a year *then* elapsed, became due, and was in arrear from defendant to plaintiff:—Held, on special demurrer, that this was good. *Henniker* v. *Turner, E.* 6 *G.* 4. 72
2. Assumpsit against executors. Declaration stated that the testator, at the time of his death, was indebted to *J. Y.* in 200*l.* and interest upon a promissory note. That after the death of *J. Y.*, the note being unpaid, it was found before the coroner, upon view of the body of *J. Y.* then lying dead, by the oaths of lawful men, that *J. Y.* was felo de se, prout patet per recordum of the inquisition; by reason of which inquisition and felony, *J. Y.* forfeited the note, &c. to the king. That the king, by grant under his sign manual, assigned the note to plaintiff, as mentioned in a certain other inquisition, and delivered the note

to plaintiff, of which defendants, after testator's death, had notice. Breach, non-payment, either by testator or defendants. Pleas, first, testator non assumpsit; second, that the note became due and payable to *J. Y.* during his life, and the causes of action did not accrue to him within six years before exhibiting plaintiff's bill, and issue thereon; third, nul tiel record of the coroner's inquisition, and issue thereon; fourth, that there was no such grant as plaintiff alleged. The second issue was found for defendants, and all the others for the plaintiff. On motion to enter a nonsuit:—Held, first, that the second inquisition, mentioned in the grant, was an office of instruction only, and not of entitling, and need not be produced at the trial; second, that the grant passed the property in the note, though under the sign manual only. On motion in arrest of judgment:—Held, first, that the declaration sufficiently shewed the note to be a security for a debt, and that the debt and security passed to the crown by operation of law, and were assignable by the crown without indorsement; second, that after verdict, the Court would presume the coroner's inquisition to have been found by twelve jurors, if twelve were necessary, as to which point, *Quære.* On motion to enter judgment for plaintiff non obstante veredicto:—Held, first, that the plea of the statute of limitations was bad, for not shewing that *J. Y.'s* right of action was barred by the statute at the time of his death; second, that the king, not being named in the statute, was not within its operation; third, that the plea confessed a cause of action in *J. Y.*, which passed from him to the crown, and from the crown to the plaintiff, and did not allege sufficient matter in avoidance;—Ergo, plaintiff was entitled to judgment non obstante veredicto. *Lambert* v. *Taylor*, *E.* 6 *G.* 4. page 188

3. Declaration, setting out a right of common for *all* commonable cattle. Proof, that plaintiff turned out all the commonable cattle he had, but that he had no sheep:—Held, not a fatal variance. *Manifold* v. *Pennington*, *E.* 6 *G.* 4. 291

4. Pleading an issuable plea to articles in the Spiritual Court is no answer to a prohibition, if the Spiritual Judge has no jurisdiction over the matter of which he has taken cognizance. *Ex parte Williams*, *T.* 6 *G.* 4. 373

5. A count in assumpsit against an attorney for negligence, stating "that in consideration that plaintiff would retain defendant in investing money in the purchase of an annuity, defendant undertook to perform his duty in the premises; that plaintiff did retain defendant for the purpose aforesaid; yet defendant did not perform his duty in the premises, but invested the money in security of no value, by reason of which premises plaintiff lost the money:"—Held, bad, on motion in arrest of judgment. *Dartnall* v. *Howard*, *T.* 6 *G.* 4. 438

6. Matter of defence arising after action brought, cannot be pleaded in bar of the action generally, and, therefore, cannot be given in evidence under the general issue. *Lee* v. *Levy*, *T.* 6 *G.* 4. 475

7. Plea to an action for a libel, purporting to be the report of a trial, "that the alleged libel was, in substance, a true report of the trial:"—Held, bad on demurrer. *Flint* v. *Pike*, *T.* 6 *G.* 4. 528

POLICY OF INSURANCE.

See VENDOR AND PURCHASER.

Where a vessel, having sailed from her port of lading with a cargo of goods, was obliged to put back in consequence of a peril of the sea,

and it being discovered that part of the cargo, which was taken out, was damaged by sea-water, and could not be re-shipped without a delay of six weeks, the captain, in the exercise of a sound discretion, sold the damaged goods, and being unable to supply their place with others, sailed with the remainder, and arrived in safety:—Held, in an action on a policy on freight for the voyage, that the underwriters were not liable, pro tanto, for the loss of the freight of the goods so sold. *Mordy* v. *Jones*, *T.* 6 *G.* 4. *page* 479

POOR'S RATE.

See Right of Common.

1. An agreement was entered into between the owners of certain lime-stone quarries and a canal company, whereby the former covenanted to deliver to the latter, yearly for ever, *as much lime-stone as they should require*, in a merchantable state, paying 7*d.* per ton, with a stipulation that if the owners neglected to supply the stone required, the company should themselves be at liberty to enter upon the quarries and work them, paying 2*d.* per ton to the owners; and the latter, having made default, the company entered upon and worked the quarries upon the terms stipulated:—Held, that they were not rateable occupiers of land within the meaning of the 43 *Eliz.* c. 2. *Rex* v. *Trent and Mersey Navigation*, *E.* 6 *G.* 4. 47

2. By 9 *Geo.* 3. the *Oxford* canal company are entitled to rate certain *mileage* duties upon goods passing along their canal; but by 33 *Geo.* 3. c. 80, the *Grand Junction* canal company, in consideration of the injury which their canal was likely to do the *Oxford*, agreed to pay the or what are called *compensation* in lieu of the former duties, for the same sort of goods passing along the *Oxford* to and from the *Grand Junction*, "without any regard to the distance" which they might pass along the *Oxford*:—Held, that the compensation rates were equally liable to be assessed to the poor, with the mileage duties, pro tanto, in each and every parish through which the *Oxford* canal passed. *Rex* v. *Oxford Canal Navigation*, *E.* 6 *G.* 4. *page* 86

3. A canal company, being rateable to the poor as "occupiers of land," can only be rated by the same estimate as other land in the parish, namely, according to the value of their tolls to be let by the year. *Id.* *ib.*

4. Where the tithes of a parish were extinguished by act of parliament, and in lieu thereof certain annual *corn rents*, issuing out of lands in the parish, were substituted, payable to the rector quarterly, with a power of distress and sale to enforce payment:—Held, that the money, when paid, was rateable to the poor in the hands of the rector. *Rex* v. *Boldero*, *T.* 6 *G.* 4. 557

5. Where certain persons, as burgesses of a town, and occupiers of ancient messuages within it, had a right to turn cattle upon certain lands, at certain periods of the year, to the exclusion of the owners of the soil:—Held, that they had a mere right of common, in respect of which they were not rateable to the poor. *Rex* v. *Churchill*, *T.* 6 *G.* 4. 635

PRACTICE.

See Attorney, 2. 5.—Certiorari, 2, 3.—Costs.—Habeas Corpus cum Causa.—Justices, 2.—Malicious Arrest, 2.—New Trial.—Pleading, 2.

1. Where there was a submission to two arbitrators, with power to them to name an umpire, if they could

not agree, so as the umpire made his award on or before a certain additional day, and the arbitrators having named an umpire, who made an award in the plaintiff's favour, *but after the time limited had expired*, and the plaintiff held the defendant to bail, without stating in his affidavit the fact of the time having expired:—Held, that the defendant was not entitled to be discharged on filing common bail. *Masel* v. *Angel*, *E.* 6 *G.* 4. *page* 15

2. If a defendant be held to bail for a debt which is clearly and manifestly not due, it seems the Court will discharge him out of custody; but in general they will not try the merits on affidavit. *M'Ginnis* v. *M'Curling*, *E.* 6 *G.* 4. 24

3. Judgment on a warrant of attorney given to a wife dum sola, cannot be entered up after her marriage without leave of the Court, though less than a year old. On application for such leave, the Court requires an affidavit proving, not only the marriage, but the due execution of the warrant of attorney by the defendant, and the non-payment of the debt. *Metcalfe and wife* v. *Boote*, *E.* 6 *G.* 4. 46

4. Where issues are taken on several pleas, and a verdict found on one only, which is held bad, the Court will award a venire de novo. *Hick* v. *Keats*, *E.* 6 *G.* 4. 68

5. A writ of error from an inferior court may be quashed in this Court on motion; but this Court will not quash such a writ on the ground that there were less than fifteen days between the teste and the return. *Forster* v. *Laidler*, *E.* 6 *G.* 4. 174

6. After an unsuccessful motion in arrest of judgment, a party is not at liberty to move for a new trial, even within the first four days of term; for by moving to arrest the judgment, he affirms the verdict. *Philpot* v. *Page*, *E.* 6 *G.* 4. 281

7. In ejectment there is but one plaintiff; and, therefore, where several lessors of the plaintiff, who were separately interested, joined in the same ejectment:—Held, that they could not be separately heard. *Doe* v. *Bromley*, *E.* 6 *G.* 4. *page* 292

8. A defendant, in the actual custody of the Marshal, upon criminal process, in consequence of an indictment in this Court, of which he has been convicted, need not be present when a motion for a new trial is made on his behalf. *Rex* v. *Hollingberry*, *T.* 6 *G.* 4. 344

9. Where a judgment had been docketed by the proper officer in due time, but the judgment-roll was not carried in until twenty-five years afterwards, the Court refused to have it taken off the file, notwithstanding the R. E. 5 *W.* & *M.* *Barrow* v. *Croft*, *T.* 6 *G.* 4. 386

10. In an action for goods sold and delivered, the Court will not compel a defendant to allow an inspection of the goods, to enable the plaintiff to give evidence of identity, &c. *Dell* v. *Taylor*, *T.* 6 *G.* 4. 388

11. Where defendant, under a judge's order, undertook to plead within a given time, and did not plead within that time, the Court held that plaintiff was entitled to sign judgment, without giving a rule to plead. *Nias* v. *Spratley*, *T.* 6 *G.* 4. 398

12. A writ of error does not stay execution, unless the defendant suggests that there is real ground of error, where it appears that after action brought the defendant threatened to bring a writ of error, and ruin the plaintiff by law proceedings, unless he complied with certain terms. *Berdoe* v. *Bloomfield*, *T.* 6 *G.* 4. 509

13. The Court will give credit to its own officers, that they have observed all proper forms in taking affidavits. Therefore, where the

for value, to recover upon a promissory note, made payable to the payee, "or order, with interest, on demand," cannot be impeached by evidence of declarations made by the payee while the note was in his hands, and before indorsement, that it was given to him by the maker without consideration; nor can such a note be treated as overdue at the time of the indorsement, without proof of actual presentment and dishonour. *Barough* v. *White*, *T.* 6 *G.* 4. *page* 379

PUBLICATION.

See Counsel.—Evidence, 1.

PUBLIC NAVIGATION.

See Navigation.

PUIS DARREIN CONTINUANCE.

See Costs, 1.

QUO WARRANTO.

See Corporate Meeting.

1. A quo warranto information granted, against a person who had held the incompatible offices of capital burgess and town-clerk of a borough, before and since the 32 *G.* 3. c. 58. without interruption. *Rex* v. *Bond*, *T.* 6 *G.* 4. 333
2. The Court will not file a quo warranto information against one corporator for defect of title, at the instance of another whose title is equally defective, although the latter has enjoyed his office many years uninterruptedly. *Rex* v. *Cowell*, *T.* 6 *G.* 4. 336
2. Quo warranto information for the office of bailiff of a borough, describing it as "an office of great trust and pre-eminence within the borough, touching the rule and government of the borough, and the election and return of burgesses to serve in parliament for the borough." Pleas, averring that defendant had been appointed to the office, "without this, that the said office is an office touching the rule and government of the borough." General replications, taking issue on all the allegations of the pleas except the traverse, and special replications, setting forth several different customs for the appointment of the bailiff. Demurrer and joinder:—Held, first, that for "an office of great trust and pre-eminence within the borough, touching the election and return of burgesses to serve in parliament," quo warranto would lie; second, that the defendant not having traversed that part of the description had admitted it, and third, that the *general* replications being good, the demurrer to *all* the replications was bad, and entitled the crown to judgment. *Semble*, that the *special* replications were bad. *Rex* v. *M'Kay*, *T.* 6 *G.* 4. *page* 432
4. The title of the electors, corporators de facto, cannot be put in issue in a quo warranto information against the elected. *Rex* v. *Hughes*, *T.* 6 *G.* 4. 443

RATE.

See Church Rate.—Poor's Rate.

RATEABLE OCCUPIERS.

See Poor's Rate.

RECORD.

See Certiorari, 3.—Irish Judgment.

REGIMENTAL AGENT.

See Set-off.

RENT.

See Poor's Rate, 4.

REPAIRS.

See Bridges.

REVERSIONER.

See Evidence, 8.

RIGHT OF COMMON.

See Pleading, 3.—Poor's Rate, 5.

A mere right of common is not rateable. *Rex* v. *Churchill*, *T.* 6 *G.* 4. *page* 635

RIVER.

See Navigation.

RULE OF COURT.

See Practice, 9. 11.

RULE TO PLEAD.

See Practice, 11.

SALE.

See Fraudulent Agreement.—Policy of Insurance.—Ship.

Conveyance by father to son of a freehold estate, reciting, "that he (the father) was minded and had resolved to give and assure the same to his son, as well in consideration of the natural love and affection which he entertained for his son, as also in consideration of the provision which his son had that day made by his bond or obligation in writing of 1500*l.* in augmentation of the portions or fortunes of his eight sisters:—Held, that this was not a *sale* to the son, and that the conveyance did not require an ad valorem stamp, under 48 *G.* 3. c. 149. Sch. 1. *Denn* v. *Diamond*, *E.* 6 *G.* 4. 328

SEA SHORE.

See Grant.

SECONDARY EVIDENCE.

See Evidence, 3.

SESSIONS.

See Certiorari, 1, 2.

1. "The next sessions," in the 17 *G.* 2. c. 38. s. 4, means the next practicable sessions. Therefore, where appellant had notice of the allowance of overseers' accounts on the first day of the *April* sessions, entered and respited his appeal on the first day of the *July* sessions, and tried it at the *October* sessions:—Held, that the proceedings were regular. *Rex* v. *Thackwell*, *E.* 6 *G.* 4. *page* 61
2. Where an appeal, after hearing at one sessions, was *respited* until the following sessions, in consequence of an equal division of opinion on the Bench as to the merits:—Held, that no fresh notice of trial was necessary for the following sessions, although, in practice, the rule is otherwise, as to *respited* appeals. *Rex* v. *Bucks*, *E.* 6 *G.* 4. 142
3. Two justices, by an order at special sessions, directed a footway to be diverted, under the authority of 55 *G.* 3. c. 68. s. 2, against which a party aggrieved gave notice of appeal, under s. 3, to the next quarter sessions. In the interval, the justices gave notice to the appellant that they had abandoned the order, which had never been filed with the clerk of the peace pursuant to the statute:—Held, that the sessions had no jurisdiction to award the appellant his costs of preparing to try the appeal, either under the appeal clause of the 55 *G.* 3, or under s. 80 of the

18 *G*. 3. c. 78. *Rex* v. *Wing, E.* 6 *G*. 4. *page* 323

4. Where an order of removal was directed to the churchwardens and overseers of the parish of *L.*, and it appeared that *L.* was a vill, and had no churchwardens:—Held, that the defect was mere matter of form, and might be amended by the justices under the 5 *G*. 2. c. 119. s. 1. *Rex* v. *Amlwch, T.* 6 *G*. 4. 626

SETTLEMENT, *by Apprenticeship*.

See Evidence, 3, 4.

Where an apprentice to an inhabitant of the parish of *I.*, regularly, and with the consent of his master, went into the parish of *R.* on *Saturday* night, and there remained till *Monday* morning, when he returned to *I.*, having done no work for his master while absent; and at the end of four years left his master with leave for a holiday, slept one night at *R.* and then absconded:—Held, that such residence in the parish of *R.* was not an inhabitation within the 3 *W.* & *M.* c. 11. s. 8. and conferred no settlement. *Rex* v. *Ilkestone, E.* 6 *G*. 4. 64

SETTLEMENT, *by Certificate*.

Where a parish certificate, thirty-five years old, was granted by two persons who described themselves on the face of it to be "the major part of the churchwarden and overseer," and there was evidence on one side, that both before and ever since the certificate was granted, but one overseer had acted in the parish, and on the other, that in two instances, at least, two overseers had been appointed, though only one had acted:—Held, that the sessions might reasonably intend, as a question of fact, that there never had been more than one overseer appointed, and consequently that the certificate was valid. *Rex* v. *Earl Shilton, E.* 6 *G*. 4. *page* 140

SETTLEMENT, *by hiring & service*.

1. A servant in husbandry hired himself three weeks before *Martinmas* at the wages of 4*l.*, and received 1*s.* earnest from his master. No time was mentioned. He was to go into the service a week after *Martinmas*. On the day of his arrival his master said, "It is not the custom to hire servants in this parish for more than fifty-one weeks, which I forgot to mention to you at the time I hired you at *B.*, and therefore, if you have no objection, I must hire you afresh for fifty-one weeks, and give you another shilling for earnest," which the servant accepted, and remained in the service till the *Martinmas* following:—Held, that the sessions did right in determining that this was no settlement. *Rex* v. *Bottesford, E.* 6 *G*. 4. 99

2. The residence of forty days under a contract for hiring and service, must be within the compass of a single year, in order to acquire a settlement; but, it seems that the year is not to be computed from the day on which the service ends. Therefore, where a servant had been hired, and served his master for several successive years, and being hired again on the 2d *November*, 1811, resided with him in *O.* until the 14th *April*, 1812, and then travelled about with him until the year was out, when the contract was again renewed, and he went with his master to *F.*, where he remained forty days, and then returned to *O.* again, where he remained thirty-eight days, and in a month afterwards they mutually parted before the year was out:—Held, that the servant's settlement was in *O.* and not in *F.* *Rex* v. *Findon, E.* 6 *G*. 4. 116

3. An unemancipated son may acquire a settlement by a bonâ fide contract of hiring and service for a year with his father. *Rex* v. *Chillesford*, *E.* 6 *G.* 4. *page* 161

4. An unemancipated son may acquire a settlement by a bonâ fide contract of hiring and service for a year with his father, in a parish where the latter has no settlement, notwithstanding the 3 *W.* & *M.* c. 11. *Rex* v. *Winslow, E.* 6 *G.* 4. 168

SETTLEMENT, *by renting a tenement.*

1. Where a pauper hired a house and land three weeks after *May-day* 1820 to *May-day* 1821, at 15*l.* a year; and at *May-day* 1821 hired it again for the same rent for a year; and resided in the house, and occupied the land, from the date of the first hiring upwards of a year, and paid the rent:—Held, that this was renting a tenement within the intent and meaning of the 59 *G.* 3. c. 50., and conferred a settlement. *Rex* v. *Sturton-by-Stow, E.* 6 *G.* 4. 110

2. Where a pauper's brother-in-law, without any authority from the former, and without his knowledge, hired a house at 18*l.* a year, and allowed the pauper to remain in possession for two years and a quarter, and then, without notice, directed him to quit, which he did immediately, not having paid any rent or taxes during the time, — Held, that the pauper was a tenant at will, and thereby acquired a settlement by renting a tenement within the meaning of the 13 and 14 *C.* 2. c. 12. *Rex* v. *Chediston, E.* 6 *G.* 4. 269

SETTLEMENT, *by serving an office.*

1. Where several parishes, incorporated under the 22 *G.* 3. c. 83, have a common poor-house, an appointment of a governer by one of these parishes only is bad. Service, as governor of such a poor-house, even under a good appointment, would not confer a settlement, for the 22 *G.* 3. c. 83, does not constitute the office of governor a public office, and s. 39. provides that nothing in the act contained shall alter or affect the settlement of any person. *Rex* v. *Hambledon, T.* 6 *G.* 4. *page* 554

2. Where a pauper served the office of clerk of a chapel in an extra-parocial vill, but resided in an adjoining parish, and performed some of the duties of his office in that part of the parish in which he resided:—Held, that he thereby gained a settlement in the parish. *Rex* v. *Amlwch, T.* 6 *G.* 4. 626

SET-OFF.

See Insolvent Debtor, 2.

1. Where a regimental agent had received monies from the paymaster-general of the forces, under the authority of a power of attorney from the colonel, and the agent became bankrupt:—Held, in an action by the assignees for goods sold and delivered by the agent for the use of the regiment, that the colonel might set off the money which the agent had received from the paymaster-general remaining unaccounted for, in reduction of the demand. *Knowles* v. *Maitland, E.* 6 *G.* 4. 312

2. Where the paymaster of a regiment gave credit in a running account with an officer on a foreign station, for sums of money as increased pay and allowances, to which, from a misconstruction of a general order, he supposed the officer was entitled, and after having been apprized by the board of ordnance that such sums would not be allowed, suffered the officer to remain in ignorance of this fact for four years:—Held, in an action by the

SHERIFF.

SHIPS.

SLANDER.

SMUGGLING.

STAKEHOLDER.

STAMPS.

STATUTES CITED OR COMMENTED ON.

STOLEN CHECK.

See Banker's Check.

SURVEYOR OF HIGHWAYS.

See Certiorari, 1.—Highways.

TIDE.

See Navigation, 1.

TITHES.

See Poor's Rate, 4.

An Inclosure Act empowered commissioners to allot to the rector of the parish of *W. cum S.* such lands within the township of *S.* and of the titheable parts of the township of *W.* as should, (quantity, quality, and situation considered,) be equal in value to two fifteenth parts of the titheable places of the last mentioned lands and grounds, in lieu of tithes belonging to the rector, and arising within those lands and grounds. Another clause saved to all persons, their heirs, &c. (except the persons to whom any allotment should be made by virtue of the act, in respect of the interest in property for which such allotment should be made,) all such estate and interest as they had in

respect of the waste lands before the passing of the act. The commissioners allotted to the rector lands in *W.*, lands in *S.*, and lands in *A.*; such lands were more than two fifteenths of the lands inclosed in *S.* and *A.*, but less than two fifteenths of the lands inclosed in *W.*, *S.* and *A.* No one of the allotments was expressed in the award to be in lieu of the rector's tithes in *W.*:—Held, that the commissioners had not made the rector any allotment in lieu of his tithes in *W.*, and that his right to tithes in kind there was reserved to him by the saving clause. *Cooper* v. *Walker*, *E.* 6 *G.* 4. *page* 31

TOLLS.

See Poor's Rate, 3.—Turnpike, 1. 3.

TREBLE COSTS.

See Treble Damages.

Where, in trespass for an act done in pursuance of the Building Act, 14 *G.* 3. c. 78., a verdict was found for the plaintiff, subject to a reference; and the arbitrator awarded a verdict for the defendant:—Held, that the defendant was entitled to treble costs under s. 100. of the statute, the same as if the plaintiff had been nonsuited, or a verdict had been found for the defendant, at the trial. *Pratt* v. *Hillman*, *T.* 6 *G.* 4. 481

TREBLE DAMAGES.

The 29 *Eliz.* c. 4. against extortion by sheriffs and their officers, declares, that the defendant "shall lose and forfeit to the party grieved his *treble damages*:" this means three times the *full* amount of damages found by the verdict. *Buckle* v. *Bewes*, *E.* 6 *G.* 4. 1

TRESPASS.

See Building Act.—Case.—Highways, 2.

1. The actual possession of crown land, under a parol license from the crown, entitles the party so in possession to maintain trespass against a wrong-doer. *Harper* v. *Charlesworth*, *T.* 6 *G.* 4. *page* 572
2. Payment of a nominal rent to the crown, the occasional occupation of the land by sporting over it, and taking the grass by a servant, constitute sufficient evidence of such actual possession. *Id.* *ib.*
3. A party in possession under such circumstances has no legal title as against the crown, but, *semble*, that he is not an intruder upon the crown. *Id.* *ib.*

TROVER.

See Bankrupt.—Evidence, 8.—Principal and Factor.

TURNPIKE.

1. A turnpike act imposed a toll, first, upon every carriage drawn by horses; then, upon every horse not drawing; and then upon every drove of oxen or cattle; with a proviso, "that no more than one toll should be taken from any person repassing on the same day with the same horses, cattle, beasts, *and* carriages." Where a stage-coach, drawn by four horses, paid the toll in the morning, and in the evening of the same day repassed with the same driver, but with different horses and passengers:—Held, that a second toll was not payable. *Waterhouse* v. *Keen*, *E.* 6 *G.* 4. 257
2. The same act enacted "that no action should be commenced against any person for any thing done in pursuance of the act, until twenty-one days' notice should be given to the clerk to the trustees, or after

sufficient satisfaction, or tender thereof, made to the party aggrieved, or after six calendar months next after the fact committed; and that every such action should be brought in the county or place where the matter should arise, and not elsewhere; and the defendant should and might at his election plead specially, or the general issue, *not guilty*, and give evidence that the same was done in pursuance and by the authority of that act." In *assumpsit* against a toll-collector, to recover the amount of tolls improperly collected by him:—Held, that the venue should have been laid in the county where the tolls were collected, and that the defendant was entitled to twenty-one days' notice of action. *Waterhouse* v. *Keen*, *E.* 6 *G.* 4. *page* 257

3. Where a turnpike act authorised the trustees to take at *each and every* toll-bar, on the whole line of road, a certain scale of tolls; and by another section they were authorised at a meeting, upon notice thereof, to be affixed on *all* the gates, to reduce or advance *all or any* of the tolls granted by the act:—Held, that the trustees had no authority to reduce or advance the tolls at some gates and not at others. *Rex* v. *Bury and Stratton Roads*, *T.* 6 *G.* 4. 368

USAGE.

See MILITARY OFFICER.—QUO WARRANTO, 2, 3.

USER.

See HIGHWAYS, 2.

VARIANCE.

See EVIDENCE, 6.—PLEADING, 3.

Averment, that defendant warranted a horse to be sound. Proof, that defendant warranted the horse to be sound everywhere, except a kick on the leg;—Held, that this was a qualified warranty, and constituted a fatal variance between the declaration and the evidence. *Jones* v. *Cowley*, *T.* 6 *G.* 4. *page* 533

VENDOR AND PURCHASER.

See WARRANTY.

Plaintiff, residing at *Naples*, ordered goods of *M.* at *Birmingham*, "to be dispatched on insurance being effected. Terms, three months' credit from the time of arrival." *M.* effected an insurance, declaring the interest to be in plaintiff, and having marked the goods with plaintiff's initials, sent them to *Liverpool*, where they were delivered by *M.'s* agent to the owner of a vessel loading for *Naples*, by whose negligence they were damaged:—Held, that the property in the goods vested in plaintiff as soon as they left *Birmingham*, that he was liable to pay for them whether they arrived or not, and therefore, that he was entitled to sue the ship-owner for the damage done to them by his negligence. *Fragano* v. *Long*, *E.* 6 *G.* 4. 283

VENIRE DE NOVO.

See PRACTICE, 4.

VENUE.

See TURNPIKE, 2.

VERDICT.

See CERTIORARI, 2.—NISI PRIUS.—PLEADING, 2.—PRACTICE, 4. 6.—PROMISSORY NOTE, 1.—TREBLE COSTS.